

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND
REHABILITATION, LLC

and

Case 22-CA-29988

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NJ REGION

MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

This memorandum is submitted by Counsel for the Acting General Counsel in support of the Motion for Summary Judgment filed herewith.

It is submitted that the pleadings herein and the rulings made in the related representation case discussed infra, demonstrate that there is no genuine issue of fact as to any allegation in the Complaint herein and that, therefore, as a matter of law, Summary Judgment and an Order remedying in full the violations as set forth in said Complaint should issue.

I. **STATEMENT OF THE CASE**

Upon a charge filed by 1199 SEIU United Health Care Workers East, NJ Region, herein “the Union,” (charge attached hereto as Exhibit A,) a Complaint issued in Case 22-CA-29988 on May 19, 2011, (Exhibit B,) against New Vista Nursing and Rehabilitation, LLC, herein “Respondent.” The Complaint alleges in substance that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, herein “the Act,” by refusing to recognize and bargain with the Union as the exclusive bargaining representative of its

employees, in a unit appropriate for the purposes of collective bargaining, although the Union had been certified by the National Labor Relations Board, herein “the Board,” within the past year as the bargaining agent for employees within the unit.¹ (Exhibit C) The Complaint also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to furnish the Union with information requested by it which is necessary for and relevant to, the Union’s performance of its duties as the exclusive collective-bargaining representative of a unit of Respondent’s employees.

Respondent’s Answer to the Complaint (Exhibit D) puts in issue only the legal conclusions and consequences of its admitted refusal to recognize and bargain with the Union in compliance with the Regional Director’s Certification of Representative, and its admitted failure to provide the information requested by the Union.

II. BACKGROUND

Respondent is a New Jersey corporation with an office and place of business located in Newark, New Jersey, is engaged in the operation of a nursing home and rehabilitation center.

As noted above, the Union was certified in Case 22-RC-13204 on April 18, 2011, as the exclusive representative of the employees in the bargaining unit described supra (Exhibit C). The election underlying the Certification had been conducted pursuant to a Decision and Direction of Election issued on by the Regional Director on March 9, 2011 (Exhibit E). Respondent filed a timely request for review of the Decision and Direction

¹ In Case 22-RC-13204, the Regional Director, on April 18, 2011, certified the Union as the exclusive collective bargaining representative of the employees in the following unit:

All full-time and regular part-time Licensed Practical Nurses employed by the Employer at its Newark, New Jersey facility, excluding all other employees, guards and supervisors as defined in the Act.

of Election with the Board on March 23, 2011 (Exhibit F) which was denied by the Board on April 8, 2011 (Exhibit G). The Tally of Ballots of the April 8, 2011 election revealed that the Union was found to have won the election (Exhibit H). No timely objections to the conduct of the election were filed by any party to the election and the certification of the Union as the exclusive bargaining representative of the employees in the unit described supra was issued on April 18, 2011 (Exhibit C).

By letter, fax and e-mail dated May 3, 2011, telephone conversation on or about May 10, 2011 and e-mail sent on May 13, 2011, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively (Exhibits I and J, respectively; See also, Affidavit of Union Vice President Roy Garcia, Exhibit K).

By letter, fax and e-mail dated May 3, 2011, telephone conversation on or about May 10, 2011 and e-mail sent on May 13, 2011, the Union requested that the Respondent furnish the Union with the information as described in the May 3, 2011 letter, fax and e-mail (Exhibits I and J, respectively, See also, Affidavit of Union Vice President Roy Garcia, Exhibit K). To date, the Respondent has refused to recognize and bargain with the Union and has not provided the Union with the information requested in the May 3, 2011 letter (Exhibit J, See also Affidavit of Union Vice President Roy Garcia, Exhibit K). By e-mail dated May 17, 2011, Respondent informed the Region 22 office of the National Labor Relations Board that Respondent was not recognizing the Union in the certified Unit and not providing the requested information as it was testing the underlying certification in Case 22-RC-13204. (Exhibit L)

Respondent's Answer to the Complaint maintains the position that it continues to object to the Union's certification (Exhibit C, para. 8).

III. ANALYSIS AND PLEADINGS

Respondent's Answer to the Complaint admits the filing and service of the charge; jurisdictional commerce criteria; the labor organization status of the Union; and its refusal to recognize and bargain with the Union and to provide the information requested by the Union (Exhibit D, paras. 1-7², 9, 11-13, 15). Further while denying the information is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Union, a review of the request reveals that the information requested is presumptively relevant under case law and that Employer is refusing to provide the information only because of its contention that the Union is not the collective-bargaining representative of the Union, not because the information is not relevant to a duly certified collective-bargaining representative (Exhibit L). In this regard, information pertaining to the terms and conditions of employees in the bargaining unit is presumptively relevant and must be provided upon request, without need on the part of the requesting party to establish relevance or particular necessity. *Anthony Motor Company, Inc., D/B/A Honda Of Hayward*, 314 NLRB 443, 444, 352-353 (1994); See *York International Corporation*, 290 NLRB 438, 440 (1988)

² Respondent's Answer admits those portions of Complaint paragraph 7 alleging that at all material times Newt Weinberger has been as a supervisor within the meaning of Section 2(11) of the Act, and an agent of Respondent within the meaning of Section 2(13) of the Act. Respondent denies that Weinberger is Respondent's Administrator as alleged in Complaint paragraph 7. Counsel for the Acting General Counsel asserts that Respondent's denial of Weinberger's alleged title should not prevent the Board from granting this Motion for Summary Judgment, as the accuracy of the title has no bearing on Respondent's admission that it is refusing to recognize and bargain and provide requested information in order to test the Board's Certification of the Union.

Respondent also denies that the unit is appropriate for purposes of collective bargaining; the Union's status as the exclusive collective bargaining representative of the employees in the bargaining unit; and the conclusionary allegation that it has acted unlawfully in refusing to recognize and bargain collectively with the Union, including by its refusal to provide requested information to the Union. (Exhibit C, paras. 7³, 9, 14-16). Respondent contends that the Union was improperly certified by the Board as the exclusive bargaining representative of the employees in the aforesaid unit, and as a consequence is not obligated to either bargain with the Union or provide the requested information, but raises no issues which were not considered in the related representation proceeding (Exhibits J and L).

IV. ARGUMENT:

There is no genuine issue as to any material fact alleged in the complaint regarding the alleged 8(a)(5) violation.

Respondent's Answer seeks to place in issue without asserting any legally valid basis therefore, those allegations in the Complaint that assert the efficacy of the certification in establishing the Union as the lawful bargaining representative of the employees in the relevant unit, Respondent's consequent obligation to provide certain information to the Union requested by it which is necessary for and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit,⁴ and the conclusionary allegations that the Respondent, by its admitted conduct,

³ See fn. 2.

⁴ *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 435 (1967). Also, the Board has long held that information concerning pensions, health benefits and insurance are encompassed with the concept of wages, are presumptively relevant, and that failure to provide such information when requested by a certified unit's collective-bargaining representative is a violation of Section 8(a)(1) and (5) of the Act. *Coca-Cola Bottling*

has violated Section 8(a)(1) and (5) of the Act. Pursuant to the Board's established practice in such instances, the Board is hereby requested to take official notice of the prior representation proceeding in Case 22-RC-13204 including the Regional Director's Decision and Direction of Election of March 9, 2011 (Exhibit E).⁵

All issues raised by Respondent were or could have been litigated in the prior representation proceeding or are admitted in Respondent's Answer to the Complaint herein. Thus, it is well settled that the Board will not consider, in an unfair labor practice proceeding, an employer's arguments that it refused to bargain with the Board-certified collective bargaining representative on the ground that the representative was erroneously certified. *Lutheran Home of Moorestown*, 334 NLRB No. 47 (2001); *The Ritz-Carlton Hotel Company v. National Labor Relations Board*, 123 F. 3d 760 (3d Cir. 1977). As Respondent does not allege any special circumstances that would require the Board to re-examine the decision made in the representation proceeding, but merely disagrees with the Board's conclusion, it is submitted that there exists no factual issue litigable before the Board, and therefore, no matter requiring a hearing.⁶

V. REMEDY

Should the Board grant this Motion for Summary Judgment and find that Respondent has engaged in and is engaging in unfair labor practices with the meaning of Section 8(a)(1) and (5) of the Act, it is hereby requested that the Board issue an Order

Co., 311 NLRB 424, 434 (1993); *Solar Turbines International*, 244 NLRB 175, 178 (1978); *East Dayton Tool Co.*, 239 NLRB 141 (1978).

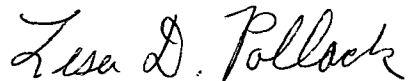
⁵ *Walt Disney World Dolphin Hotel*, 314 NLRB 154, 155 (1994); *Frontier Hotel*, 270 NLRB 1142 (1984), citing; *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967) enf'd. 388 F. 2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967) enf'd. 415 F. 2d 26 (5th Cir. 1969); *Intertype Co. v. Pennello*, 269 F. Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F. 2d 91 (7th Cir. 1968); Sec. 9(d) of the N.L.R.A., as amended.

requiring Respondent to cease and desist therefrom, and upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement and to provide the Union with the information requested in its May 3, 2011 letter.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, it is further requested that the Board, in its Order, direct that the initial year of certification begin on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit.⁷

Dated at Newark, New Jersey, this 9th day of June, 2011.

Respectfully submitted,



Lisa D. Pollack
Counsel for the General Counsel
National Labor Relations Board
Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

⁶ *Walt Disney World Dolphin Hotel*, 314 NLRB 154 (1994), citing *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

⁷ *Walt Disney World Dolphin Hotel*, 314 NLRB 154, 155 (1994), citing *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962) enf'd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F. 2d 57 (10th Cir. 1965).

INDEX OF EXHIBITS

<u>Exhibit Letter</u>	<u>Description</u>
A.	Charge filed in Case 22-CA-29988 Proof of Service of Charge in Case 22-CA-29988
B.	Complaint in Case 22-CA-29988 Proof of Service of Complaint in Case 22-CA-29988
C.	Regional Director's Certification of Representative in Case 22-RC-13204
D.	Respondent's Answer in Case 22-CA-29988
E	Decision and Direction of Election in Case 22-RC-13204
F	Respondent's Request for Review in Case 22-RC-13204
G	Board's Order denying Request for Request for Review in Case 22-RC-13204
H	Tally of ballots in Case 22-RC-13204, April 8, 2011
I	Union's request for bargaining dated and request for information dated May 3, 2011
J	Union's request for bargaining and request for information dated May 13, 2011 and Employer's refusal to bargain and provide information dated May 13, 2011
K	Affidavit of Roy Garcia
L.	E-mail dated May 17, 2011 from Respondent's attorney

INTERNET
FORM NLRB-501
(2-08)UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case

22-CA-29988

Date Filed

5/13/2011

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer

New Vista Nursing and Rehabilitation

b. Tel. No. 973-484-4222

c. Cell No.

f. Fax No. 973-484-9141

g. e-Mail

h. Number of workers employed

d. Address (Street, city, state, and ZIP code)

300 Broadway
Newark, NJ 07104

e. Employer Representative

Newt Weinberger

i. Type of Establishment (factory, mine, wholesaler, etc.)

Nursing Home

j. Identify principal product or service

Health Care

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) 5 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)

Since on or about May 3, 2011, the above-named Employer, through its officers, agents and representatives, has failed and refused to meet or schedule meetings for purposes of collective bargaining with 1199 SEIU United Healthcare Workers East ("the Union"), the certified collective bargaining representative of the Employer's LPNs.

Since on or about May 3, 2011, the above-named Employer, through its officers, agents and representatives, has failed and refused to provide information requested by the Union that is necessary and relevant to the Union's ability to negotiate a collective bargaining agreement for the Employer's LPNs.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)

1199 SEIU United Health Care Workers East

4a. Address (Street and number, city, state, and ZIP code)

555 Route 1 South, 3rd Floor
Iselin, NJ 08830

4b. Tel. No. 732-287-8113

4c. Cell No.

4d. Fax No. 732-287-8117

4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

Service Employees International Union

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief

By 
(signature of representative or person making charge)

William S. Massey, Attorney

(Print type name and title or office, if any)

Tel. No. 212-228-7727

Office, if any, Cell No.

Fax No. 212-228-7854

e-Mail

wmassey@grmny.com

Address 817 Broadway, 6th Fl, NY, NY 10003

5/13/11

(date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Exhibit A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

New Vista Nursing and Rehabilitation

and

1199 SEIU United Health Care Workers East

Case No. 22-CA-29988

DATE OF MAILING:May 16, 2011.....

AFFIDAVIT OF SERVICE OF

CHARGE

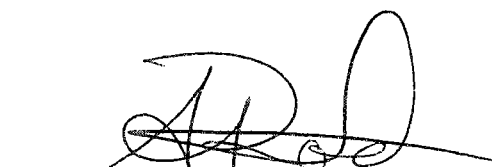
I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid mail upon the following persons, addressed to them at the following addresses:

REGULAR MAIL

Mr. Newt Weinberger
New Vista Nursing & Rehabilitation Center
300 Broadway
Newark, NJ 07104

1199 SEIU United Health Care Workers East
555 Route 1 South
3rd Floor
Iselin, NJ 08830

William S. Massey, Esq.
Gladstein Reif & Meginniss, LLP
817 Broadway
6th floor
New York, NY 10003


ANETT RODRIGUES

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

NEW VISTA NURSING AND
REHABILITATION, LLC

and

Case 22-CA-29988

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NJ REGION

COMPLAINT

1199 SEIU United Health Care Workers East, NJ Region, hereinafter called the Union, has charged that New Vista Nursing & Rehabilitation, herein called by its correct name, New Vista Nursing and Rehabilitation, LLC, and hereinafter called Respondent, has been engaging in unfair labor practices as set forth in the National Labor Relations Act, 29 U.S.C. § 151 et seq., herein called the Act. Based thereon, the Acting General Counsel, by the undersigned, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, issues this Complaint and alleges as follows:

1. The charge in this proceeding was filed by the Union on May 13, 2011, and a copy was served by regular mail on Respondent on May 16, 2011.
2. At all material times Respondent, a New Jersey corporation with an office and place of business in Newark, New Jersey, herein called Respondent's Newark facility, has been engaged in the operation of a nursing home and rehabilitation center.

Exhibit B

3. During the preceding twelve months Respondent, in conducting its business operations described above in paragraph 2, derived gross revenues in excess of \$100,000.

4. During the preceding twelve months, Respondent in conducting its business operations described above in paragraph 2, purchased and cause to be delivered to its Newark, New Jersey facility, goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

5. At all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

6. At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

7. At all material times Newt Weinberger has held the position of Administrator and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act, and an agent of Respondent within the meaning of Section 2(13) of the Act:

8. The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time Licensed Practical Nurses employed by Respondent at its Newark, New Jersey facility, excluding all other employees, guards, and supervisors as defined by the Act.

9. On April 18, 2011, the Union was certified as the exclusive collective-bargaining representative of the Unit.

10. At all times since April 18, 2011, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

11. About May 3, 2011, the Union, by letter, requested that Respondent recognize and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

12. Since about May 13, 2011, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

13. Since about May 3, 2011, the Union, by letter, has requested that Respondent furnish the Union with the following information:

a. Any and all documents, including but not limited to job descriptions and performance evaluations that describes the job duties for LPNs.

b. For each employee working in a bargaining unit position, including current probationary employees, such documents as will show the following:

- 1) Job title for each employee;
- 2) Date of hire;
- 3) Current hourly rate of pay;
- 4) Regular hours of work;
- 5) Number of overtime hours worked (on a quarterly basis if possible) and 2009 and 2010;
- 6) Home address;
- 7) Whether employee is classified as per diem;

c. Documents showing the total cost to the Employer for each of the following benefits provided to bargaining unit employees for the periods from January 1 through December 31, 2009, and January 1

through December 31, 2010: health, dental, vision, life insurance, and pension/retirement plan.

- d. Documents showing the name of each unit employee covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child.
- e. Documents showing the health insurance premiums paid by each unit employee, and SPD of the health insurance plan.
- f. Documents showing all current unit employees who have opted out of health insurance coverage.
- g. Documents showing unit members' current paid time off benefits such as, holidays, vacation, sick days, personal days, and the accrual formula for such paid time off.
- h. SPD for the unit employees' life insurance policy.
- i. SPD for the unit employees' retirement benefits.
- j. Documents showing the date and amount of the last wage increase for each bargaining unit member.
- k. Documents showing the overtime policy currently applicable to unit employees.

14. The information requested by the Union, as described above in paragraph 13 is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

15. Since about May 13, 2011, Respondent, by Administrator Newt Weinberger, has failed and refused to furnish the Union with the information requested by it as described above in paragraph 13.

16. By the conduct described above in paragraphs 12 and 15, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act in violation Section 8(a)(1) and (5) of the Act.

17. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before June 2, 2011, or postmarked on or before June 1, 2011.** Unless filed electronically in a pdf format, Respondent should file an original and four copies of the answer with this office.

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at <http://www.nlr.gov>, click on the **E-Gov tab**, select **E-Filing**, and then follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the document need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer

containing the required signature be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to Motion for Default Judgment, that the allegations in the complaint are true.

Dated at Newark, New Jersey, this 19th day of May, 2011.



J. Michael Lightner
Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND
REHABILITATION, LLC

and

1199 SEIU UNITED HEALTH CARE WORKERS EAST,
NJ REGION

RA-SECY

Case No. 22-CA-29988

DATE OF MAILING May 19, 2011

AFFIDAVIT OF SERVICE OF COMPLAINT

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated above I served the above-entitled document(s) by post-paid mail upon the following persons, addressed to them at the following addresses:

CERTIFIED MAIL

Morris Tuchman, Esq.
Law Offices of Morris Tuchman
134 Lexington Avenue
New York, NY 10016

William S. Massey, Esq.
Gladstein Reif & Meginniss, LLP
817 Broadway
6th floor
New York, NY 10003

REGULAR MAIL

Newt Weinberger, Administrator
New Vista Nursing and Rehabilitation Center,
LLC
300 Broadway
Newark, NJ 07104

Roy Garcia, Vice President
1199 SEIU United Health Care Workers East,
NJ Region
555 Route 1 South
3rd Floor
Iselin, NJ 08830

Subscribed and sworn to before me this 19th day

of May, 20 11

DESIGNATED AGENT

NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND REHABILITATION, LLC

Employer

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NJ REGION

Petitioner

TYPE OF ELECTION

(CHECK ONE)

☐

CONSENT

☐

STIPULATED

☒

RD DIRECTED

☐

BOARD DIRECTED

(ALSO CHECK BOX
BELOW WHEN APPROPRIATE)

☐

8(b)(7)

CASE 22-RC-13204

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

1199 SEIU UNITED HEALTHCARE WORKERS EAST, NJ REGION

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.
UNIT:

All full-time and regular part-time Licensed Practical Nurses employed by the Employer at its Newark, New Jersey facility, excluding all other employees, guards, and supervisors as defined by the Act.

Exhibit C



Signed at Newark, New Jersey

On the 18th day of

April 2011

/s/ J. Michael Lightner

Regional Director, Region 22
National Labor Relations Board

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

-----X
NEW VISTA NURSING AND
REHABILITATION, LLC

and

ANSWER
Case No. 22-CA-29988

LOCAL 1199, SEIU, UNITED HEALTH CARE
WORKERS EAST NEW JERSEY REGION
-----X

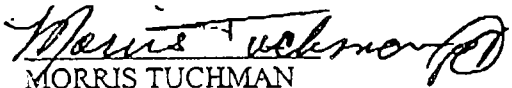
Respondent, New Vista Nursing and Rehabilitation Center, et al, and for its
Answer to the Complaint, alleges as follows:

1. Admits the allegations contained in paragraphs 1 through 6 and 9, 11, 12, 13
and 15 of the Complaint.
2. Admits the allegations contained in paragraph 7 except, denies that Weinberger
is the Administrator.
3. Denies each and every allegation contained in paragraphs 8, 10, 14, 16 and 17
of the Complaint.

WHEREFORE, Respondent requests the Complaint be dismissed in its entirety.

Dated: New York, New York
May 26, 2011

Yours, etc.,


MORRIS TUCHMAN
Attorney for the Respondent
134 Lexington Avenue
New York, New York 10016
(212) 213-8899

CERTIFICATE OF SERVICE

The undersigned certifies that on the 27th day of May 2011, I mailed a copy of the foregoing **ANSWER TO COMPLAINT** in Case No. 22-CA-29988 on the parties designated below hereof by first class mail, postage prepaid, to the last known address of the parties as set forth herein below:

William S. Massey, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
New York, New York 10003



Patricia Falcone
Paralegal

**R.D. # 02-11
Newark, New Jersey**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**NEW VISTA NURSING AND
REHABILITATION, LLC¹**

Employer

and

CASE 22-RC-13204

**1199 SEIU UNITED HEALTHCARE WORKERS
EAST, NJ REGION**

Petitioner

DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION

Petitioner, 1199 SEIU United Healthcare Workers East, NJ Region (the Union) filed a representation petition pursuant to Section 9(c) of the National Labor Relations Act. The Union seeks to represent all full-time and regular part-time licensed practical nurses (LPNs) employed by New Vista Nursing and Rehabilitation, LLC (the Employer) at its Newark, NJ facility. The Employer argues that the petitioned-for unit is inappropriate inasmuch as its LPNs are supervisors as defined in the Act, and that the petition should be dismissed. The Employer argues that its LPNs are supervisors because

¹ The Employer's name appears as amended at the hearing.

they discipline and effectively recommend discipline of the Employer's certified nurse aides (CNAs), and because they responsibly direct the work of the CNAs. Based on the following facts and analysis, I reject this argument and order an election as set forth below.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed;
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein;³
3. The labor organization involved claims to represent certain employees of the Employer;⁴
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act;
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described *infra*:

² Briefs filed by the Petitioner and the Employer have been duly considered.

³ The Employer, a New Jersey corporation, is engaged in the operation of a nursing home and rehabilitation center at its 300 Broadway, Newark, New Jersey, facility, the only location involved herein. The parties stipulated that during the preceding twelve months, the Employer derived gross revenues in excess of \$100,000 and during that same period of time, purchased and caused to be delivered to its Newark, New Jersey facility, goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey.

⁴ The parties stipulated, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

All full-time and regular part-time Licensed Practical Nurses employed by the Employer at its Newark, New Jersey facility, excluding all other employees, guards, and supervisors as defined by the Act.⁵

II. FACTS

a. Background

The Employer operates a 340 bed nursing and sub-acute care facility in Newark, New Jersey. Administrator Newt Weinberger oversees the entire facility. Victoria Alfeche is the Director of Nursing⁶ (DON) and Catherine Carido is the Assistant Director of Nursing (ADON). Anthony Bautista is the Employer's staffing coordinator.

The facility operates 24 hours a day, seven days a week, utilizing day, evening, and overnight work shifts. The record indicates that the day shift runs from 7:00 a.m. to 3:00 p.m., the evening shift is from 3:00 p.m. to 11:00 p.m., and the overnight shift is from 11:00 p.m. to 7:00 a.m. Alfeche, who oversees the entire nursing department, generally works from about 8:00 a.m. until about 6:00 p.m., making her physically present for most of the day shift and part of the evening shift. Reporting to Alfeche are two nursing supervisors and three unit managers. One nursing supervisor works on the evening shift and one nursing supervisor works on the overnight shift, each responsible for supervising the entire 340-bed facility during their respective shifts. The record reflects that Alma Isip, a registered nurse, is the Nursing Supervisor on the overnight shift and Grace Tumamak, an LPN, is the unit manager for the 3rd floor on the day shift.

⁵ During the hearing, the parties stipulated that the Employer's Director of Nursing, Nursing Supervisors (also known as Evening or Night Supervisors), and Unit Managers are supervisors under Section 2(11) of the Act. The parties also stipulated that the unit clerks, who primarily assist nurses with paperwork related to resident appointments, are not supervisors under Section 2(11) of the Act. The unit clerks are not part of the petitioned-for unit.

⁶ Alfeche has served as the Employer's Director of Nursing since 2005. From 2002-2005, Alfeche served as the Employer's Assistant Director of Nursing.

Thelma Ibanga and Leonita Fernandez are nursing supervisors for the Employer, but it is unclear from the record what shifts they work. During the day shift, there are three unit managers, one for each of the floors where residents are housed.

Residents are housed on floors 3, 4, and 5 of the Employer's six-story facility. The kitchen, rehabilitation center, and the Employer's offices are located on the second floor. Each residential floor is divided up into east and west units, and the staffing quotient for each floor turns on the type of care provided, the time of day, and the resident census. For example, on the day shift, Grace Tumamak is the unit manager for the third floor. One nurse (either an RN or an LPN) is assigned to each unit on the floor, with 4 or 5 CNAs assisting the nurses to meet all resident care needs. Nurses⁷ give medications and perform treatments (e.g. splints) on residents while ensuring that CNAs have performed their resident care responsibilities. CNA duties include basic care of residents and assistance with daily living functions, such as feeding, bathing, grooming, dressing, hygiene and walking.

The Employer employs 42 LPNs. Significantly more CNAs work at the Employer's facility but the record does not reflect an exact number or an approximation. The Petitioner represents the Employer's CNAs for collective bargaining purposes, but it is unclear from the record when this relationship began or what other classifications of the Employer's employees are included in this bargaining unit.

⁷ Herein, the term "nurse" refers to the position of Licensed Practical Nurse.

b. Scheduling and Assignment of Resident Rooms

Bautista creates pre-printed assignment sheets for CNAs in most facility units.⁸ These assignment sheets contain columns listing the post number, room assignments, feeder rooms, shower duties and other special assignments, as well as scheduled break times. According to Alfeche, the nurses (LPNs or RNs) fill in the CNA name assigned to a specific post, as well as any special assignments required of that post during the shift. There is no record evidence that these selections are made based on analysis of CNA skill sets. Roldan and LPN Abosede Adekanmbi acknowledge that nurses delegate this assignment task to senior or more capable CNAs. CNAs keep their post assignments for an entire month to maintain continuity of care while special assignments rotate on a weekly basis. At the beginning of every month, posts are rotated facility-wide in a pre-determined fashion (e.g. CNAs working on Post 1 rotate to Post 2). In response to resident or family complaints, nurses may temporarily reassign CNAs to different rooms.

CNA staff adjustments are sometimes made based on patient census, or as a result of someone leaving early or calling off. If a CNA calls the facility and indicates that he or she will be absent, or a CNA leaves work early due to illness, either the unit manager or the staffing coordinator will try to find coverage for the unit. These attempts involve either pulling CNAs from other units or calling CNAs not scheduled to work to gauge their ability to cover the shift. Although Alfeche testified that in these instances, nurses will call CNAs to ask them to come in to work, testimony from nurses makes clear that the staffing coordinator performs this function and that at his direction, CNAs will call off-duty CNAs to try to find coverage. In this regard, Adekanmbi, an LPN at the

⁸ Marisol Roldan, an LPN working on 5 West, testified that she revised the pre-printed assignment sheets due to large resident turnover in her unit. 5 West is a sub-acute care unit where new admissions and patient turnover are more common than in the Employer's long-term care units.

Employer's facility for 10 years, testified that she has never been provided a list of CNA telephone numbers, she has never heard of an LPN calling a CNA to cover a shift, nor does she have authorization to grant overtime to a CNA (should a short-staffed situation invoke CNA contractual overtime rights).

When the unit manager or staffing coordinator are unable to secure sufficient coverage, the shift nurse and CNAs divide up the extra work and room assignments among themselves. No record evidence indicates that nurses take into account CNA qualifications or experience when, by necessity, these room reassignments are made.

c. Resident Care and Direction over CNAs

At the start of each shift, nurses take reports from the outgoing shift nurse both verbally and in the form of 24-hour reports, which document patient changes, e.g. changes in appetite, to ensure continuity of care. These 24-hour reports are not shared with the CNAs. As noted, CNA duties include basic care of residents and assistance with daily living functions. CNAs perform this work pursuant to their monthly assignment sheets. Twenty-five year LPN Agnes Ramirez testified that these assignments are rarely changed, citing emergencies as one occasion warranting assignment changes. CNAs use an accountability book to document the work they perform (e.g. bathing and feeding residents). This book is reviewed by unit managers and unit clerks to verify that assignments are being completed and failure to either document or perform this work may lead to discipline. As noted earlier, the CNA assignment sheets contain a column which sets specific break times for each CNA. The record is silent as to whether CNAs must report to the nurse before going on break, or whether a nurse can delay a scheduled break or request that the CNA return from break early in the interest of patient care.

The nurses oversee the work of the CNAs. The work of the CNAs is largely routine and does not require continuous supervision. During the shift, nurses will provide residents with medications, perform treatments, complete charting, and follow up on any changes in the conditions of residents. In the course of these duties, nurses will verify that residents have their needs met and assist CNAs, if necessary, with patient care. LPN Ramirez testified that if a CNA is unfamiliar with a task, the CNA can ask her and she will tell him/her how to do it. The CNA may also ask a more senior CNA for assistance. If a nurse discovers that a CNA has not performed a required task, like feeding a resident, the nurse can speak with the CNA, find out why this task was not performed, and provide guidance to ensure the problem is corrected. There is conflicting testimony in the record regarding what happens when a CNA continuously fails to perform tasks. Some nurses testified that they will write up the CNA, filling out the fact section of an Employer discipline form and forward it to either the nursing supervisor or unit manager, while other nurses report what happened to their unit managers and are then asked to fill out an incident report sheet documenting the problem.

d. LPN Job Descriptions

LPN job descriptions accompany annual appraisals that these nurses receive. There are 66 performance standards listed on this job description, a revised form of the previous job description which first issued as part of employees' 2010 appraisals.⁹ The Employer points to the following job description elements as evidence of supervisory status:

⁹ Alfeche testified that drafting of this revised job description began in 2009, implementation took place in 2010, and the first in-service meeting to discuss these enhanced responsibilities occurred in late January 2011.

- 2) Supervise and evaluate all direct resident care provided and initiate appropriate action as necessary;
- 26) Counsel supervised staff and recommend disciplinary action to Director of Nursing Service

The record contains no evidence that LPNs' ratings in these enumerated categories were impacted by their imposition of discipline on CNAs, their supervision acumen related to CNAs, or failure to perform either of these tasks. Furthermore, although the record is replete with evidence of LPNs being disciplined for attendance problems, insubordination, and other performance-related reasons, no LPN has been disciplined for failing to discipline CNAs or improper supervision of CNAs.

e. Discipline of CNAs

Notice of Corrective Action forms¹⁰ are the official disciplinary forms used for CNAs and nurses. They are kept at the nurses' station on each floor. These forms contain space for a recitation of the facts, boxes to check the degree of discipline meted out, information about the offending party, room for a response from the offending party, and signature lines for all involved in the disciplinary action. The LPN job description states that nurses may "initiate appropriate action as necessary" and can "recommend disciplinary action to the Director of Nursing..."

The Employer's progressive discipline procedure is set forth in its employee handbook for all employees. There are two groups of work rule offenses in the progressive discipline procedure. These rules cover a wide variety of employee misconduct, including attendance, attitude, appearance, work performance, insubordination, theft, intoxication, and violation of resident rights.

¹⁰ The record also contains employee warning notice forms, which predate the notice of corrective action.

If a nurse believes that a CNA has violated the Employer's work rules, the nurse has the discretion to (1) do nothing; (2) verbally counsel the employee without issuing any write-up; or (3) report misconduct to either the nursing supervisor or unit manager.

LPN witnesses presented conflicting testimony regarding the extent of their authority to address and remedy violations of the Employer's work rules.

Marisol Roldan, a 15-year employee, testified that she would fill out an employee warning notice if she observed a CNA doing something she wasn't supposed to do and she did not need permission to complete this form. Roldan would speak to the CNA before completing the form. If she had personal knowledge of the CNA's disciplinary history, she would fill this part of the form out- otherwise, this portion would be completed by the nursing supervisor or DON. Roldan would forward her write-up to a supervisor without suggesting or identifying the type of warning the CNA should receive.

Roldan testified that she has completed warning notices for CNAs on two occasions, once for insubordination and once for a CNA who failed to properly position their resident. Roldan did not issue either discipline to the employees in question. Only the latter discipline has been supplied by the Employer as part of this record. Roldan also testified that she wrote a statement recommending the termination of an insubordinate CNA after directing him to leave the floor, but Roldan acknowledged that this incident took place about 10 years ago (prior to the current owners purchasing the facility). The Employer supplied no written documentation corroborating Roldan's testimony regarding this episode.

Simon Ramirez, a 4-year employee, testified that if he observed a CNA failing to perform her duties, he would speak to her the first time. If the performance issues

continued, he and a co-worker would administer a verbal counseling, which he did not consider part of the Employer's progressive discipline policy. A third occurrence would lead Ramirez to issue a discipline. Ramirez asserts that he does not need permission to use the Employer's discipline forms, which are located by the nurses' station. He fills out the top portion of the form (outlining the facts, who committed the infraction, the shift and date of the occurrence) and gives it to either the nursing supervisor or unit manager. Ramirez does not speak to the CNA again after forwarding this paperwork to the supervisor and does not fill out the corrective action portion of the warning notice. Ramirez cited a December 2007 incident in which he initiated discipline against a CNA for taking extended breaks as one of the two times he disciplined or recommended discipline of a CNA. In the second incident, which occurred two or three years ago, Ramirez recommended to the Employer that CNA Darlene Williams be discharged for taking excessive breaks and for insubordination. The Employer failed to supply any written documentary evidence of the Williams incident for the record.

Agnes Ramirez, an LPN at the Employer's facility for 25 years, testified that if a CNA continuously failed to perform a task or endangered a resident, she had no choice but to give a write-up. When pressed for specifics, Ramirez recalled an incident (with no timeframe provided) in which she filled out an investigation report sheet to document a non-compliant CNA's performance. She described what happened on the form and furnished it to her unit manager. Ramirez has never filled out a notice of corrective action nor has she filled out an employee warning notice.

Grace Tamamak has worked for the Employer for the past 23 years. She started working as a unit manager in about 2002 or 2003 (preceding all of the disciplines entered

into the record). From her appointment as unit manager until about December 2009, Tumamak worked as a unit manager on the day shift and worked as a regular LPN on the overnight shift. In about December 2009, Tumamak started working exclusively as a unit manager. Tumamak issued 19 of the 33 disciplines entered into the record by the Employer. Five of these disciplines occurred on about the same date (9/1/09) after Tumamak, as a unit manager, reviewed the CNA accountability book and discovered several transgressions. On all but one of the disciplines Tumamak initiated, she did not mark the discipline the offending employee should receive.¹¹

Tumamak testified that she writes up nurses that work in her unit, as well as CNAs. For CNA write-ups, normally nurses will let her know what happened and she will investigate by asking the nurse to give her a statement, and soliciting statements from the CNA and any eyewitnesses. Tumamak follows the same protocol for write-ups that originate on other shifts but are forwarded to her for processing.

Tumamak further testified that for disciplines on her shift, she simply fills out the top part of the discipline form (reporting the facts underlying the infraction) and submits the discipline form to the DON. Tumamak never actually issues disciplines to employees and never sits in on meetings between the accused, the CNA union representative, and a member of upper management (usually the DON).

Wendy Thompson, an LPN who has worked for the Employer for the past 3 ½ years, testified that she has never issued a discipline to a CNA and is not aware of other LPNs issuing disciplines. She explained that if she has a concern about a resident not receiving the proper care, she speaks to Tumamak, who indicates that she will handle the

¹¹ Tumamak testified that she will only check this box if she is certain that the CNA has not previously been warned for this infraction.

situation. Tumamak has twice requested that Thompson fill out an investigation report sheet, reporting what she observed. Thompson did not recommend to Tumamak what discipline should be meted out and she did not know whether any discipline resulted from her investigation report submissions. Thompson testified that these two incidents involved male CNAs who allegedly did not wash their patients well and provided inadequate care.

The Employer supplied as part of the record a resident concern form filled out by Thompson in April 2010. Thompson testified that a resident's family member told her about an incident with the CNA caring for her mother, Thompson reported to Tumamak what happened, and Tumamak requested that Thompson fill out the resident concern form. Thompson never spoke to the CNA and does not know whether this CNA was disciplined as a result of this report. Thompson further testified that anybody (a CNA, nurse, etc.) can fill out a resident concern form, which is located near the nurses' station.

Abosede Adekanmbi has worked for the Employer as an LPN since 2000. Adekanmbi testified about the discipline form in the record that she initiated in September 2010. She says that while working in 3 East, a resident told her that she wanted to get out of bed. Adekanmbi relayed the resident's wish to the CNA assigned to her room. Later that day, the resident's daughter complained to Adekanmbi about her mother not getting out of bed that day. The next day, Adekanmbi called Tumamak to report this incident and Tumamak instructed her to write a statement, which is found on the top of the discipline form. Adekanmbi did not check "verbal warning" or write "counseling" on the form and nobody asked her opinion regarding the severity of the discipline appropriate to remedy this matter. Tumamak supplied her with the form and

Adekanmbi says that this is the only time in her career that she had written on one of these forms.

Adekanmbi further testified that she was a witness to an argument between a CNA and an LPN, Alycia Reese, in late January 2011. Alfeche called her several days after the argument to ask her happened that day and Adekanmbi was also present when Alfeche spoke to the unit clerk about this same incident.

Alfeche contends that LPNs have the authority to issue disciplines to CNAs on their own and to also effectively recommend discipline of their subordinates. She asserts that she determines the severity of the punishment but that LPNs can offer a specific discipline recommendation. No record documentary evidence was offered by the Employer to support the latter conclusionary statement.

Alfeche further testified that once a corrective action form is filled out and a nurse determines that a rule violation has occurred, a discipline action will issue. This is regardless whether eyewitnesses present contradictory statements during the investigation or other exculpatory evidence is presented. Alfeche asserts that the offending employee can grieve the discipline if he or she believes it is improper. When pressed on cross-examination, Alfeche admitted that she speaks to the offending party, his or her union representatives, and any eyewitnesses volunteered by the parties as part of the Employer's investigation into the incident. But Alfeche insists that any information obtained would only impact the severity of the discipline issued, not the discipline itself.

The Employer points to 33 examples of such action in the record covering a period of approximately 6 1/2 years. This evidence is summarized as follows:

<u>Date</u>	<u>Issuing LPN</u>	<u>Exh. pg #</u>	<u>Signed</u>	<u>Reason</u>
7/21/04	Maggie Dempaire	ER 18	Yes	Insubordination
12/13/06	Marivic Palacios	ER 4, 110	No	Poor Performance
5/22/07	Joyce Silva	ER 4, 92	Yes	Insubordination
12/29/07	Simon Ramirez	ER 11	Yes	Poor Performance
2/22/08	Joyce Silva	ER 4, 93	No	Poor Performance
6/26/08	Grace Tumamak	ER 4, 66	No	Poor Performance
6/30/08	Grace Tumamak	ER 4, 91	No	AWOL on Unit
9/3/08	Rolando P.	ER 4, 13	Yes	Insubordination
10/14/08	Marisol Roldan	ER 4, 4	Yes	Poor Performance
3/1/09	Grace Tumamak	ER 4, 79	No	Sfty rounds not done
5/4/09	Mati Mompus	ER 17	Yes	AWOL on Unit
7/27/09	Angel Medina	ER 4, 62	No	Poor Performance
8/21/09	Grace Tumamak	ER 4, 33	No	Account. Book Check
8/21/09	Grace Tumamak	ER 4, 68	No	Account. Book Check
8/21/09	Grace Tumamak	ER 4, 47	No	Account. Book Check
8/21/09	Grace Tumamak	ER 4, 95	No	Account. Book Check
8/22/09	Grace Tumamak	ER 4, 86	No	Account. Book Check
9/1/09	Grace Tumamak	ER 4, 85	No	Poor Performance
9/1/09	Grace Tumamak	ER 4, 105	No	Poor Performance
9/1/09	Grace Tumamak	ER 4, 46	No	Poor Performance
1/6/10	Grace Tumamak	ER 4, 106	No	Poor Performance
1/18/10	Donna Willis	ER 4, 2	Yes	Insubordination
4/23/10	Grace Tumamak	ER 4, 104	No	Resident Concern
5/24/10	Joyce Silva	ER 4, 73	No	Poor Performance
5/27/10	Recel Ybanez	ER 4, 5	Yes	Poor Performance
6/20/10	Grace Tumamak	ER 4, 83	No	Poor Performance
6/21/10	Grace Tumamak	ER 4, 22	No	Sfty rounds not done
6/29/10	Grace Tumamak	ER 4, 25	No	Poor Performance
8/9/10	Grace Tumamak	ER 4, 27	No	Poor Performance
9/16/10	Abosede Adekanmbi	ER 4, 102	No	Poor Performance
10/15/10	Grace Tumamak	ER 4, 20	No	Poor Performance
11/5/10	Grace Tumamak	ER 4, 28	No	Harassment/Threats
1/31/11	Alycia Reese	ER 4, 1	Yes	Insubordination

In the preponderance of cases, discipline issued to a CNA is investigated by unit managers or upper management. The LPN becomes involved only as a fact witness to the underlying incident. LPNs rarely if ever check-mark the penalty level of discipline because they do not have access to employees' personnel files and do not know where the employee stands in the progressive disciplinary scheme. Even when an LPN's report is

the impetus, she is not routinely given notice of the outcome of a disciplinary matter, and is never present if discipline is served. LPNs are absent from such meetings even when their signatures appear on the discipline form being issued. The DON or other upper management officials make all final disciplinary decisions. There is no evidence that the DON or other stipulated supervisors completing the disciplinary write-ups consult with any LPNs regarding any aspect of the discipline.

f. Evaluations

Unit managers or nursing supervisors evaluate LPNs annually. These stipulated supervisors have also historically evaluated CNAs. At an in-service meeting attended by a handful of LPNs in late January 2011 (after the filing of the instant petition), the Employer announced that beginning in 2011, nurses would complete performance appraisals for CNAs. At the time of the hearing in February, no CNA appraisals had been performed by LPNs.

III. LEGAL ANALYSIS

A. Standard for Supervisory Status

Section 2(3) of the Act excludes from the definition of the term “employee” “any individual employed as a supervisor.” Section 2(11) of the Act defines a “supervisor” as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.¹²

¹² At the hearing, the parties stipulated that LPNs who are not also unit managers, do not hire, layoff or recall, promote or reward employees, grant time off or grant wage increases, adjust grievances, or discharge employees.

Individuals are “statutory supervisors if: 1) they hold the authority to engage in any one of the 12 listed supervisory functions, 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and 3) their authority is held in the interest of the employer.” *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001). Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same.

The Board has reaffirmed that the burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *NLRB v. Kentucky River*, supra at 711-712. In addition, the Board’s long recognition that purely conclusionary evidence is not sufficient to establish supervisory status remains viable. The Board requires evidence that the individual actually possesses supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995) (conclusionary statements without specific explanation are not enough). The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). To separate straw bosses from true supervisors, the Act prescribes that the exercise of supervisory indicia be in the interest of the employer and requires the use of independent judgment. Thus, “the exercise of some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner does not confer supervisory status on an employee.” *Somerset Welding & Steel, Inc.*, 291 NLRB 913 (1988), quoting *Feralloy West Co.*, 277 NLRB 1083, 1084 (1985).

Although the Act demands only the possession of Section 2(11) authority, not its exercise, the evidence still must be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent independent evidence of the possession of the described authority. *Id.*; *Golden Crest*, *supra* at 731, citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000).

B. Assignment of Work

The Board in *Oakwood Healthcare* defined assigning work as the “act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” *Oakwood Healthcare*, *supra* at 689.

Time

The record establishes that the CNAs’ scheduled hours are determined by the scheduling coordinator. LPNs do not schedule CNAs’ work hours or break times. If the facility is short-staffed due to CNAs calling off, the scheduling coordinator or unit manager is primarily responsible for handling these calls and procuring a replacement CNA. Sometimes the scheduling coordinator delegates this task to the CNAs themselves, but record testimony indicating that this task is wholly within the purview of LPNs is not persuasive. If the scheduling coordinator is unable to replace the CNA, the nurses and/or CNAs divide up the unassigned work. Furthermore, no specific record evidence was adduced demonstrating any LPN authority to approve overtime work for CNAs and the record is silent regarding LPN authority to mandate CNAs to stay over to provide

additional coverage. Based on the above, the Employer has not established the exercise of supervisory authority by LPNs in scheduling CNAs.

Place and Tasks

In *Oakwood Healthcare*, the Board found that emergency room charge nurses designated nursing staff to geographic areas within the emergency room. The Board found that this assignment of nursing staff to specific geographic locations within the emergency room fell within the definition of “assign” for purposes of Section 2(11). *Oakwood Healthcare*, supra at 695. Here, CNAs are assigned to their post and rooms by either the schedule coordinator, an LPN, or a senior CNA. Once assigned, CNAs’ daily tasks are largely defined by the schedule generated by the scheduling coordinator. CNA post assignments are continuous for a month and rotate in a manner outside the influence of LPNs.

CNAs routinely assist nurses and vice versa with various aspects of direct patient care. This may involve the nurse assigning a discrete task to a CNA. Nurses’ assignments of these “discrete task[s]” in these circumstances are closer to “ad hoc assignments” described in *Croft Metals*, 348 NLRB 717, 721 (2006), rather than the ER assignments discussed in *Oakwood*. In *Croft Metals*, supra at 721, the Board found that the switching of tasks by lead persons among employees assigned to their line or department was insufficient to confer supervisory status. Here, the LPNs’ assignments of discrete tasks to CNAs is insufficient to confer supervisory status.

Similarly, when a unit is short-staffed, there is some evidence that a nurse sometimes may seek to have an additional CNA pulled from another unit or floor, or called in from home, for the duration of the shift. The record, however, does not

establish that the nurse desiring additional support takes into account CNAs' abilities when making her request (to the scheduling coordinator or unit manager). An occasional transfer due to short-staffing is nothing more than switching the tasks among employees, and does not confer supervisory status. *Croft Metals*, supra at 722. The Employer has not established that any isolated temporary reassignment of duties by an LPN or a CNA for the balance of a shift denotes supervisory status.

Independent Judgment

In *Oakwood Healthcare*, the Board, consistent with *Kentucky River*, adopted an interpretation of "independent judgment" that applies to any supervisory function at issue "without regard to whether the judgment is exercised using professional or technical expertise." The Board explained that "professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Oakwood Healthcare*, supra at 692. The Board then set forth standards governing whether the exercise of the Section 2(11) criteria are carried out with independent judgment: "actions form a spectrum between the extremes of completely free actions and completely controlled ones, and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these extremes." Id. at 693. The Board found that the relevant test for supervisory status utilizing independent judgment is that "an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. Further, the judgment must involve a degree of discretion that rises above the "routine or clerical." Id.

I now examine whether the LPNs exercise independent judgment regarding assignment of work. In *Oakwood Healthcare*, the Board found that the term “assign” encompassed a charge nurse’s responsibility to assign nurses and aides to particular patients. *Oakwood Healthcare*, supra at 689. The Board found that “if the registered nurse weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel, the nurse’s assignment involves the exercise of independent judgment.” *Oakwood Healthcare*, supra at 693. The Board found that the charge nurses who worked outside of the emergency room used independent judgment in matching patients and nursing staff. For example, nurses who were proficient in administering dialysis were assigned to a kidney patient. The charge nurse assigned staff with skills in chemotherapy, orthopedics or pediatrics to the patients with needs in those areas. Charge nurses also assigned the nursing personnel to the same resident to ensure continuity of care. The nurses who were assisting a patient with a blood transfusion were not assigned to other ill patients. Charge nurses determined whether a mental health nurse or an RN should be assigned a psychiatric patient. *Oakwood Healthcare*, supra at 696-697. In contrast, the Board found that the emergency room charge nurses did not “take into account patient acuity or nursing skill in making patient care assignments.” The evidence did not show “discretion to choose between meaningful choices on the part of charge nurses in the emergency room.” *Oakwood Healthcare*, supra at 698.

Here, although the staffing coordinator, nurses, and senior CNAs make initial resident assignments for CNAs, for the most part, CNAs remain assigned to the same posts. This facility-wide policy means that CNAs will remain with the same residents for

a month and then rotate on a pre-determined basis. Nurses play no role in this monthly rotation. To the extent that nurses make isolated reassignments, the Employer has not shown that they perform a detailed analysis of CNAs' abilities and residents' needs. Unlike the nurses who have extensive training and skills, CNAs do not possess specific training or skills in various medical areas. The record demonstrates that the CNAs' assignments are routine in nature and based on their title, rather than on any particular expertise.

I earlier found that LPNs do not assign by designating CNAs to a specific schedule or by giving them significant overall duties. I further conclude that, even if they do so, they do not exercise independent judgment in such assignments. Concerning the nurses' assignments of CNAs to particular "times" of work, the Board held in *Oakwood Healthcare* that "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices;" but that "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policy or rules, the verbal instructions of higher authority, or in the provisions of a collective bargaining agreement." *Oakwood Healthcare*, supra at 697-698. Initial scheduling simply allows either an LPN or senior CNA to place CNAs on posts with pre-assigned rooms and weekly tasks. Special tasks rotate on a weekly basis and posts rotate on a monthly basis. As for the assignment of duties, the CNAs' overall tasks are largely defined by the routine nature of the residents' daily living functions with which they assist and detail in their accountability books. As 25-year veteran Agnes Ramirez testified, assignments are rarely changed, and only under exigent circumstances. In the spectrum set out by the Board, the nurses' assignment of discrete

tasks and the isolated temporary switching of tasks by nurses falls closer to “completely controlled” actions, rather than “free actions.” They do not involve a “degree of discretion that rises above routine or clerical.” *Oakwood Healthcare*, supra at 693. Thus, I find that the assignment of tasks by LPNs does not require the use of independent judgment.

Responsible Direction

For direction to be responsible, the person directing must have oversight of another’s work and be accountable for the other’s performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others’ deficiencies. *Oakwood Healthcare*, supra at 691-692, 695.

The Employer has failed to establish that LPNs direct responsibly. What is needed, and lacking here, is evidence that LPNs risk a real prospect of adverse action for CNAs’ poor performance. The record lacks evidence that any LPN has been disciplined for failure to oversee or correct CNAs or as a result of the CNAs’ failure to adequately perform their duties. This is in contrast to the asserted RN supervisors in *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1550-1551 (6th Cir. 1992), who were counseled by Beverly regarding their responsibilities in administering employee discipline and one of the RNs was individually counseled regarding her failure to discipline a nurse’s aide. This gaping evidentiary hole stands in contrast to over 100 disciplines issued by the Employer to LPNs, and received in the record, covering a myriad of other topics ranging from medication errors to insubordination to attendance deficiencies.

Moreover, there is no evidence that the Employer imparted clear and formal notice to the LPNs that they will be held accountable for the job performance of CNAs. See *Golden Crest Healthcare*, supra at 731. Although the LPN job description, which the Employer recently re-issued to all LPNs, lists oversight responsibilities for CNAs, the record does not disclose that the Employer has trained LPNs on the ramifications of their being held responsible for the performance of others.

The Employer has not adduced specific evidence that LPNs may be disciplined, receive a materially meaningful poor performance rating, or suffer any other adverse consequence due to a deficiency in their CNAs' performance. Nor is it shown that the Employer has warned them that they face such a risk. As a result, the Employer has not demonstrated that LPNs are held accountable for those they direct. I find, therefore, that they do not possess the authority responsibly to direct. *Lynwood Manor*, 350 NLRB 489, 491 (2007); *Golden Crest Healthcare*, supra at 731.

Discipline and Effective Recommendation of Discipline

The Employer contends that LPNs possess supervisory disciplinary authority by their power to (a) initiate formal progressive discipline; (b) effectively recommend discipline; and (c) remove CNAs from the floor due to insubordination. I disagree. I find instead that LPNs' role in discipline to be reportorial and I decline to find supervisory status on that basis. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Ten Broeck Commons*, 320 NLRB 806, 813 (1996); *Northwest Nursing Home*, 313 NLRB 491, 497-498 (1993); *The Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

The record shows LPN involvement in actual progressive discipline of CNAs 33 times over a 6 ½ year period. Witness testimony adduced at the hearing as well as a review of the discipline forms themselves illuminate the role that unit manager Tumamak played in initiating 19 of these disciplines.¹³ Tumamak testified that she has worked exclusively as a unit manager, a stipulated 2(11) position, since about December 2009. Eight of the record disciplines attributed to Tumamak occurred after December 2009 and therefore, can not be relied upon as evidence of unit employees initiating or administering progressive discipline.

From about 2003 through December 2009, Tumamak worked double shifts on the same unit. On the day shift, she served as a unit manager and on the overnight shift she worked as a regular LPN. Despite the Employer's attempts to separate Tumamak's LPN work from her supervisory capacity, the record evidence, including Tumamak's own testimony, make such a distinction untenable. Tumamak testified that she initiated disciplines attributable to accountability book errors in her capacity as a unit manager. All five CNAs disciplined in August 2009 for such errors worked the overnight shift, when Tumamak allegedly held no supervisory authority. Yet it is Tumamak who issued all five of these disciplines, belying the Employer's assertions. Based on these facts, it is clear that Tumamak held disciplinary authority as a unit manager on at least two shifts from 2003-2009 and I shall not rely upon any discipline initiated by Tumamak as evidence of LPN disciplinary authority.

¹³ Tumamak signed none of the disciplines she initiated. Her name appears on the disciplinary forms in evidence only because Alfeche placed it there in preparation for the instant hearing. Five other disciplines in the record that were not initiated by Tumamak were also not signed. Alfeche identified these disciplines as being initiated by LPNs Palacios, Silva (twice), Medina, and Adekanmbi based on their handwriting and she placed their names on the disciplines in preparation for the hearing.

Testimony by Simon Ramirez, Marisol Roldan, and Abosede Adekanmbi confirms the reportorial role of LPNs in the Employer's progressive discipline scheme. Ramirez initiated a notice of corrective action against a CNA in late December 2007 for repeatedly taking excessive breaks and for failing to properly care for a resident. He filled out the top portion of the form reporting what he observed and had no further involvement in the matter. Roldan initiated an employee warning notice against CNA Stella Ighasa in October 2008 for failing to properly position a resident and for failing to empty a Foley catheter bag. Roldan filled out the top portion of the form reporting what she observed and when, and had no further involvement in the matter. Adekanmbi initiated a notice of corrective action against CNA Phyllis Machania in September 2010 for failing to help a resident get out of bed. Adekanmbi, who provided the most specific testimony of the three witnesses regarding the circumstances surrounding the incidents in question, testified that she reported this matter to Tumamak, who instructed Adekanmbi to write out a statement. Tumamak provided Adekanmbi with the form and instructed her where on the form to write her account. Adekanmbi had no further involvement in the matter.

The above LPN witnesses provide the only direct testimony regarding the remaining 14 disciplines in the record. This sampling, along with the remainder of the record evidence, raises substantial doubt that LPNs truly possess the authority to discipline. They have no access to CNA personnel files, and therefore cannot recommend specific levels of disciplines. None of the LPNs filled out the corrective action section on the forms.¹⁴ They are not included in upper management's investigations of misconduct, except for the witness statement already supplied with the

¹⁴ Even Tumamak testified that she did not do this, with the exception of one occasion.

discipline form. There is no showing that they are routinely informed when CNAs receive discipline. Even when they submit anecdotal reports, there is no regular mechanism, as far as the record reveals, to advise them of the outcome. They are barely on the margins of the disciplinary process. Therefore, I conclude that the Employer has failed to carry its burden of proof to establish that LPNs possess and exercise authority to discipline.

The Employer also argues that LPNs have the authority effectively to recommend discipline. To prevail, the Employer must prove that: (a) LPNs submit actual recommendations, and not merely anecdotal reports, (b) their recommendations are followed on a regular basis, (c) the triggering disciplinary incidents are not independently investigated by superiors, and (d) the recommendations result from the LPNs' own independent judgment. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enf. denied on other grds. 712 F.2d 40 (2nd Cir. 1983), cert. denied 466 U.S. 978 (1984) (to be effective, a recommendation must be both followed and *not* independently investigated).

Alfeche testified that all disciplinary forms initiated by LPNs result in discipline to the offending CNA. Even assuming this conclusionary testimony is correct, the Employer has still failed to establish that they effectively recommend discipline. First, as described above, LPNs are simply reporting factual findings to their superiors without any specific recommendation for disciplinary action. Second, Tumamak testified that when she receives a discipline form from an LPN, she will ask for statements from the reporting nurse, the offending aide, and any eyewitnesses. She then forwards this information to higher authorities, usually Alfeche, for the imposition of discipline. Adekanmbi also testified regarding the notice of corrective action initiated by LPN

Alycia Reese in late January 2011. Adekanmbi, an eyewitness to an argument between Reese and the offending CNA, was called by Alfeche and asked what she observed. Adekanmbi was also present when Alfeche solicited the account of the unit clerk, who also witnessed this incident. It is clear from the above that most, if not all of the factors necessary to prove authority to effectively recommend discipline are absent from this record.

Furthermore, testimony from Roldan and (Simon) Ramirez regarding their termination recommendations of two CNAs is unpersuasive. Roldan testified that about ten years ago, she submitted to management a termination recommendation for an insubordinate CNA after she directed him to leave the floor. No documentary evidence was supplied to corroborate this testimony. Additionally, the record is silent as to whether Roldan's superiors conducted an independent investigation of her claims. Since the facility administrator is involved in all discharge decisions, it is clear that there must have been some investigation to verify Roldan's assertions. But no such evidence was adduced at the hearing. Likewise, Simon Ramirez testified that about two or three years ago, he recommended the termination of CNA Darlene Williams, and she in fact was terminated, due to excessive breaks and insubordination. No written documentary evidence regarding this incident is part of the record. Also, no Employer witnesses provided testimony to corroborate these allegations or to illuminate the record regarding the Employer's investigation into this matter. Based on the paucity of evidence adduced regarding these termination recommendations, and the lack of foundational details, the Employer has not satisfied its burden to prove that LPNs have the authority effectively to recommend discipline.

The Employer relies on a Regional Director's decision in *RC Operator, LLC d/b/a Willow Terrace*, 4-RC-21728 (September 13, 2010), Board review denied on November 17, 2010, to support its supervisory status contentions. The facts in *RC Operator* are distinguishable from the instant record. In *RC Operator*, the Employer began operating its long-term nursing facility in early July 2010. The following month, the Employer conducted an in-service training with its charge nurses where the facility Administrator informed them that they are in charge of disciplining CNAs. He gave each employee a copy of the new employee handbook and told them that they could determine what type of discipline to impose based on the categories of conduct outlined in the progressive discipline policy. In the five weeks after the Employer began operations (and before the representation case hearing), a charge nurse had issued a CNA a written warning for insubordination.

In *RC Operator*, the record established that the charge nurse herself determined the level of discipline to be meted out and did not consult with any higher authorities prior to issuing this discipline. Also, management did not conduct an independent investigation into this incident, but simply accepted her version and discipline recommendation. In stark contrast to *RC Operator*, the instant record reveals that LPNs did not receive formal training regarding their purported disciplinary authority outlined in their job descriptions. Furthermore, LPNs here do not recommend a specific discipline warranted by the facts that they report. Also, it appears from Tumamak and Adekanmbi's credible testimony that statutory supervisors conduct independent investigations by soliciting statements from witnesses as well as the offending aides.

Based on the above, I find the facts and conclusions outlined in *RC Operator* to be distinguishable from the instant record.

Even assuming *arguendo* that the actions of the LPNs cited by the Employer constituted discipline or the effective recommendation of discipline, the record still yields a minor number of instances over a six-year period in which these actions were exercised. Removing Tumamak's disciplines (as well as those of Ramirez, Roldan, Adekanmbi, and Reese¹⁵) from the record evidence yields only 10 disciplines issued by a bargaining unit of 42 LPNs over a period of 6 ½ years. The Board cautions against finding supervisory authority based only on infrequent instances of its existence. *Family Healthcare, Inc.*, 354 NLRB No. 29, JD slip op. at 6-7 (2009); *Golden Crest Healthcare*, supra at 730 n.9. I am reluctant to extinguish Section 7 rights here on such a slender record of disciplines over a six year stretch. This conclusion is fortified by Agnes Ramirez's testimony that in her 25-year career as an LPN with the Employer, she has never filled out a notice of corrective action or an employee warning notice. Therefore, I find that the Employer has not met its burden of proving supervisory status on this basis.

Removing CNAs from the Floor

The Employer also argues that LPNs possess supervisory authority and have exercised this authority by directing CNAs to leave the floor. In support of this argument, the Employer relies on the testimony of Marisol Roldan and Simon Ramirez regarding two discrete incidents. I find that the Employer has not carried its burden of proof in this regard.

¹⁵ Reese's discipline was issued on January 31, 2011, six days after the Petitioner filed its representation petition.

Roldan testified that more than ten years ago, and before the current owners took control of the facility, she directed an insubordinate CNA off of the floor and to a supervisor's office. She has not ordered any other employee off of the floor since that time. This stale piece of evidence is unsupported by any written documentary evidence. Roldan supplied no name or other substantive facts beyond her subsequent recommendation that this CNA be terminated and her belief that he was in fact discharged.

Ramirez's testimony yielded a more meager offering than Roldan. Ramirez testified that about three and a half years ago, he sent an abusive CNA off of the floor to speak with a supervisor. Ramirez did not recall the female CNA's name nor could he recall any facts regarding this incident. No testimony was adduced from Alfeche on this matter nor was any written documentary evidence entered into the record.

On such a skeletal offering, I can not find this testimony sufficient to satisfy the Employer's burden of proof. The infrequency of occurrences here is an infirmity, as are the timing of the incidents and the paucity of details and documentation accompanying said testimony. Therefore, the record here does not warrant a finding that the Employer's LPNs are statutory supervisors by virtue of their ability to remove subordinates from the floor. Accordingly, I find that LPNs do not possess statutory supervisory authority to discipline or effectively make such recommendations.

Secondary Indicia

It is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to

establish supervisory status. *Golden Crest Healthcare*, supra at 730 n. 10; *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

The written job description for LPNs arguably implies the presence of supervisory authority. But the power insinuated by this document is belied by the realities shown in the record. The Board has long cautioned that evidence of actual authority trumps mere paper authority. *Avante at Wilson*, supra at 1057; *Golden Crest Healthcare*, supra at 731; *Valley Slurry Seal Co.*, 343 NLRB 233, 246 (2004). I conclude that the job description is a mere paper conveyance that does not impart actual supervisory authority.

Conclusion

Based on the above and the record as a whole, I find that the Employer's LPNs are not statutory supervisors under Section 2(11) of the Act. Therefore, I find them to be employees as defined in the Act and order their inclusion in the petitioned-for bargaining unit.

IV. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Employees engaged in an economic strike who have retained their status as strikers and have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such

strike that have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented for collective bargaining purposes by **1199 SEIU UNITED HEALTHCARE WORKERS EAST, NJ REGION**.

V. LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters in the unit found appropriate above shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in NLRB Region 22, 20 Washington Place, Fifth Floor, Newark, New Jersey 07102, on or before

March 16, 2011. No extension of time to file this list shall be granted except in extraordinary circumstances nor shall the filing of a request for review operate to stay the requirement here imposed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. The Board in Washington must receive this request by **March 23, 2011**. The request may be filed electronically through E-Gov on the agency's website, www.nlr.gov, but may not be filed by facsimile¹⁶.

Signed at Newark, New Jersey this 9th day of March, 2011.

/s/ J. Michael Lightner
J. Michael Lightner, Regional Director
National Labor Relations Board
Region 22
20 Washington Place- 5th Floor
Newark, New Jersey 07102

¹⁶ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlr.gov.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW VISTA NURSING & REHABILITATION ,

Employer,

and

CASE 22-RC-13204

**1199 SEIU, UNITED HEALTHCARE WORKERS,
EAST NEW JERSEY REGION,**

Petitioner.

**EMPLOYER'S REQUEST FOR REVIEW OF
REGIONAL DIRECTOR'S DECISION OF MARCH 9, 2011**

I. BACKGROUND

On January 24, 2011, the Petitioner ("1199") filed the petition in Case 22-RC-13204 seeking to be certified as the exclusive bargaining representative for all full-time and regular part-time licensed practical nurses ("LPN's") employed by the Employer. On February 14, 17 and 18, 2011, a hearing was held before Hearing Office Eric Pomianowski. At the hearing, the Employer took the position that all the petitioned-for LPN's are statutory supervisors because they discipline and effectively recommend discipline with respect to the Employer's Certified Nurse Aides ("Aides"). The parties stipulated that LPN's who are employed as "Unit Managers" were statutory supervisors. 1199 argued that all other petitioned-for LPN's are not supervisors within the meaning of Section 2(11) of the Act; and, the Regional Director determined in his March 9, 2011 Decision and Direction of Election that these other petitioned-for LPN's were employees under the Act and ordered an election be held for them.

Exhibit F

II. BASIS FOR SEEKING REVIEW

Review is appropriate in this case because it involves a substantial question of law because of the Regional Director's departure from officially reported precedent and his failure to take into account the Board's precedent for Employers with progressive discipline systems. While the Employer relied on the Board's reported decisions in Oak Park Nursing Center, 351 NLRB 27 (2007); Wiltshire at Lakewood, 345 NLRB 80 (2004), as amended 345 NLRB 1050 (2005); Mountaineer Park, Inc., 343 NLRB 145 (2004); and Bredero Shaw, 345 NLRB 782 (2005), as well as Extendicare Health Services, Inc. v. NLRB, 182 Fed.Appx. 412 (6th Cir. 2006); Kentucky River Community Care v. NLRB, 193 F.3d 444 (6th Cir. 1999), *aff'd. in relevant part* 532 U.S. 706 (2001); NLRB v. Attleboro Associates, Ltd., 176 F.3d 154 (3rd Cir. 1999); Passavant Retirement & Health Care Center v. NLRB, 149 F.3d 243 (3rd Cir. 1998), the Regional Director did not address, analyze or distinguish any of these precedents dealing with determination of supervisory status relating to discipline under progressive discipline systems. The Regional Director instead relied on an incomplete paraphrase of prior Board precedent relating to when evidence of the frequency of exercising supervisory authority is required, including reliance on language in an ALJ decision affirmed by the Board in 2009 that, pursuant to a decision of the Supreme Court of the United States in 2010, is invalid for lack of the necessary quorum and is inapposite in any case under relevant Board precedents.

III. FACTUAL BACKGROUND

New Vista Nursing & Rehabilitation is a 340-bed nursing home, with resident

rooms on three (3) floors (3rd, 4th and 5th), each with two (2) wings (Tr. 15), Sides A and B (Tr. 158). In each resident care wing, there are 5-6 Aides and either a RN or LPN during each of three (3) shifts (Tr. 16). The Director of Nursing (DON) is Victoria Alfeche, RN (Tr. 11). She normally works from 8:30 am through 6:00 pm (Tr. 14). The Nursing Department at New Vista includes the Aides (Tr. 13), who are supervised by either a RN or LPN (Tr. 13), who are supervised by a Unit Manager or Nursing Supervisor, depending on the shift involved (Tr. 14), who are supervised by the DON (Tr. 14), who has the assistance of a consultant, the Vice President of Operations, three days a week (Tr. 13-14). The DON reports to the Administrator (Tr. 13-14). There is also an assistant director of nursing (ADON) (Tr. 37). The facility operates with three (3) shifts: 7 am – 3 pm (morning), 3 – 11 pm (evening), and 11 pm to 7 am (night) (Tr. 17-18). There are currently only three (3) Unit Managers, one for each resident floor, while previously there were six (6) (Tr. 143). The Unit Managers work the morning shift. On the evening and night shifts, there is only one Evening or Night Supervisor sharing supervisory responsibilities with the LPNs (Tr. 17-19, 87) after the DON leaves for the day.

The LPNs and the Aides are direct care givers for the residents of New Vista (Tr. 15). The Aides are under the supervision of the LPNs (Tr. 15). During the day, there is a Unit Manager for each floor, while during the night shift there is only an additional Night Supervisor for all three (Tr. 17-18). One of the Unit Managers is a LPN (Grace Tumamak), who works on the 3rd floor; and, who also previously worked as a LPN for a wing on one shift and a Unit Manager on a different shift (Tr. 236-237; 140); and, an LPN is in charge of each of the wings of the 3rd floor (Tr. 197). On the 5th floor, there is

a RN for one of the wings and a LPN for the other during the 3-11 pm shift (Tr. 157). An LPN is in charge of one wing of the 4th floor during the 7 am – 3 pm shift (Tr. 225).

The LPN's Job Description, Exhibit E-2 at Item 2, expressly provides that the LPNs "Supervise and evaluate all direct resident care provided and initiate appropriate action as necessary." The Job Description at Item 26 expressly provides that LPN's "Counsel supervised staff and recommend disciplinary action to Director of Nursing." All of the LPN's received job evaluations that included scores related to these job responsibilities (Exhibit E-5, E-8, E-12, E-13, E-15, E-16).

The LPNs must make sure that the Aides have completed their assigned jobs for the care of the residents (Tr. 24). Their Job Description, Exhibit E-2 at Item 20, expressly provides that the LPNs "Provide clinical supervision to nursing assistants and monitor for completion of assigned duties." (Tr. 41-42). The LPNs are responsible for supervising the Aides who work in their wing to make sure all work assigned is done properly (Tr. 23-24, 41-42).

New Vista has a progressive discipline process and policy defined in its Employee Manual (Exhibit E-7 at pages 42-44, 51-52; Tr. 148) which sets forth violations in work-related and attendance-related classes each with its specified progressive disciplinary steps. The procedures for work-related violations (at page 42) permit any employee's supervisor to begin disciplinary action at any step in the process, whether the LPN, the Unit Manager, a RN or other Nursing Supervisor (Tr. 125) The progressive discipline steps include: (a) Verbal warning; (b) Written warning; (c) Suspension without pay for up to 5 days (depending on the severity of the violation); (d) Suspension without pay pending a departmental hearing on discharge; and, (e) discharge/termination. The New

Vista Administrator must be notified of any recommendation for discharge. *Id.* at page 42. The level of severity of the discipline imposed is a function of both the nature of the specific violation (Group) and whether the Employee has received prior discipline within the 1 year before the new violation. Employees receive a copy of the Employee Manual when they are hired (Tr. 153). New Vista also has a collective bargaining agreement (CBA) with the Union, under which the Union is involved in the discipline process and permitted to grieve disciplinary actions taken without “good cause.” (Tr. 119, 122, 155-156).

For work-related disciplinary actions, a LPN may determine whether an Aide has committed a disciplinary violation (Tr. 29, 37, 87); and, if such a determination is made, whether to “write up” that Aide for the offense (Tr. 29, 36-37, 87). A LPN may counsel an Aide rather than initiating discipline (Tr. 29, 42, 205; Exhibit E-2 at Item 26, relating to job duty to counsel supervised staff). Once an LPN determines that a write up for an offense is appropriate, the LPN initiates the write up using New Vista forms (Tr. 86). The level of discipline to be issued is determined by the DON based on her determination of what is required for the violation charged by the LPN under the progressive disciplinary policy in the Employee Manual, including the number of days for any suspension (Tr. 86; 148; 155). When the DON is not available, the ADON or the Night Supervisor acts as her designee (Tr. 37). The discipline then is issued to the Employee and, where required, the Union; and, thereafter, the write up is made a part of the Employee’s personnel file (Tr. 86; 149-150).

Attendance-related disciplinary actions are initiated by a request from the DON after review of attendance records for other staff to prepare a write up (Tr. 152). Any

employee, including an Aide, can also trigger an investigation of the need for possible discipline or corrective action by filing a statement with a supervisor, including concerns covered by New Jersey's Conscientious Employee Protection Act (CEPA) (Tr. 83-85, 176-177, 277-278).

A write up is made using a form available at the nurse's station on each floor (Tr. 164, 203) on which the LPN states the basis for the write up (Tr. 130). The form to be used was recently changed (Tr. 146 comparing "Notice of Corrective Action" form with newer "Employee Warning Notice" form Exhibits E-4 and E-9). An LPN does not need anyone's permission to get the form or to write up an Aide (Tr. 39, 165). The write up is then usually taken to the Unit Manager for the floor to obtain documentation relating to the violation from the Aide involved and any witnesses (Tr. 147). The DON does not conduct an independent investigation of the LPN's basis for each write up (Tr. 120), but she does accept and obtain supporting documentation for the file, leaving to the grievance process any disputes concerning the underlying violation (Tr. 120-122). The forms and procedures used are the same, whether the disciplinary action is initiated by an LPN or a Unit Manager or any other Nursing Supervisor (Exhibits E-4, E-11, E-17, E-18 and P-1).

New Vista presented both testimony and documentation that LPN's have written up Aides (Exhibits E-4, E-11, E-17, and E-18).

LPN Marisol Roldan testified that she disciplines Aides who work in her wing and that she wrote up one Aide for insubordination and another for failure to properly reposition residents (Tr. 168-169; Exhibit E-4 at page 4). In the insubordination case, LPN Roldan testified that she recommended that the Aide be terminated and he was terminated (Tr. 169). In the failure to reposition case, she noted that the Aide had been

warned previously because she had given the prior warning (Tr. 166). She testified that in the insubordination case, she also ordered the Aide off the floor and the Aide left (Tr. 193).

LPN Simon Ramirez testified that he disciplines Aides who work in his wing and that he wrote up one Aide for excessive breaks (Exhibit E-11; Tr. 205). He also testified that he has recommended that an employee be terminated and that employee was terminated (Tr. 211 as to Employee DW). He testified that he could ask an Aide to leave the floor if the Aide was not following his directions, as well as in cases where resident abuse might be at issue (Tr. 203); and, that he has done so (Tr. 216).

LPN Agnes Ramirez testified that she writes up Aides who work in her wing and that she wrote up an Aide who did not comply with her care instructions (Tr. 228-229).

LPN Grace Tumamak, who has the same job description as to counseling and disciplining supervised staff as other LPN's, testified that she writes up Aides when they do something wrong (Tr. 238). She testified that she does write ups whether she is working as a Unit Manager/LPN or simply as a LPN in charge of a wing (Tr. 239-240). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 20) but only the top part of the page (Tr. 240). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 22), including checking off the "verbal warning" line because she was sure this was the Aides first offense (Tr. 242-243). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 25), again only the top part, and gave the completed form to the DON (Tr. 243). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 27) (Tr. 243-244). She testified that she filled out the "Notice of Corrective Action"

form (Exhibit E-4 at page 28), again only the top part, and gave the completed form to the DON (Tr. 244). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 33) (Tr. 244). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 46), just the top only (Tr. 245-246). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 47), again only the top (Tr. 246). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 66), again only the top (Tr. 246-247). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 68), again only the top (Tr. 247). She testified that she filled out the "Notice of Correction Action" form (Exhibit E-4 at page 79), again only the top (Tr. 247). She testified that she filled out the "Notice of Correction Action" form (Exhibit E-4 at page 83) (Tr. 247). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 85), again only the top (Tr. 248). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 86), including the check for "verbal warning," after she determined that a warning was appropriate (Tr. 248-249). She testified that she filled out the "Notice of Corrective Action" (Exhibit E-4 at page 95), again only the top part (Tr. 249). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 104) (Tr. 249). She testified that she filled out the "Notice of Corrective Action" form (Exhibit E-4 at page 105), again only the top part (Tr. 249). She testified that she filled in the "Notice of Corrective Action" form (Exhibit E-4 at page 106) (249-250).

The disciplinary actions initiated by LPN Grace Tumamak used the same forms and were limited to the same portions of the forms as with the disciplinary actions

initiated by all other LPNs. In the LPN Grace Tumamak cases, as with the other LPN-initiated disciplinary actions, the DON determined the applicable level of discipline to be imposed pursuant to the progressive discipline policies and procedures (Tr. 86; 148; 155). The Union has stipulated that LPN Grace Tumamak is a Section 2(11) Supervisor in that she now works as a Unit Manager. Board Exhibit 3.

LPN Wendy Thompson, a Union witness, testified that her job description includes supervision of the work of the Aides and recommending disciplinary action (Tr. 275), but that she takes her concerns to her Unit Manager, who was the LPN/Unit Manager, Grace Tumamak (Tr. 276). She testified that she does check that her Aides have done their work (Tr. 274) and has been able to resolve most of her problems with the Aides (Tr. 274). She testified that in two cases she was not able to resolve herself, she reported them to the LPN/Unit Manager and wrote out a statement of her concerns (Tr. 278-279). She also testified about the information she provided for the write up that is included in Exhibit E-4 at page 17 (Tr. 265-266), indicating that the information she provided was a transmittal of a resident concern and not a disciplinary action. The DON had already confirmed this in her testimony (Tr. 45). The types of disciplinary forms used by other LPNs to recommend discipline of Aides were used on the same floor that this LPN worked on by her Unit Manager, Grace Tumamak (Exhibit E-4; Tr. 238-250).

LPN Abosede Adekanmbi, the other Union witness, testified that the job description she signed as hers includes supervision of the work of the Aides and recommending disciplinary action (Tr. 306). She testified that in her capacity as a LPN she supervises the quality of the Aides' work during her rounds; and, if she is not satisfied with the explanation an Aide gives for poor work, she takes her concerns to her

Unit Manager or the Nursing Supervisor (Tr. 307, 309), sometimes filling out an “investigative report” form (Tr. 295, 310), leaving for them to determine what proper action to take. She also testified that she was not really aware of what authority she had as a LPN (Tr. 312). She also testified that she was aware of the DON requesting information from staff about the facts related to the write up that is included in Exhibit E-4 at page 1 (relating to January 27, 2011) (Tr. 290-291). She also testified that the information she provided for the write up included in Exhibit E-4 at page 102 was provided at the request of her LPN/Unit Manager, Grace Tumamak (Tr. 294). The write up about which LPN Abosede Adekanmbi testified, at Exhibit E-4 at page 1, resulted in a Suspension for 1 day with a note stating: “Next offense of being disrespectful to nurse will be terminated.” The Union witness testimony supports the facts reported by the LPN who wrote up the Aide and signed the “Notice of Corrective Action” form, Aliyicia Reese. The types of disciplinary forms used by other LPNs to recommend discipline of Aides were used on the same floor that this LPN worked on by her Unit Manager, Grace Tumamak (Exhibit E-4; Tr. 238-250).

The Employer’s examples of LPN disciplinary actions against Aides, in addition to those filed by LPN/Unit Manager Tumamak, contained in Exhibit E-4, include:

Page 1 Suspension for 1 day with note that “next offense of being disrespectful to nurse will be terminated.” (2011)

Page 2 Warning (2010)

Page 4 Warning with note that “next offense is suspension or as the case may be” (2008)

Page 5 & 73 Suspension pending admin. decision (note that under Employee Manual, the Administrator is involved when discharge has been recommended) (2010)

Page 15 First Written Warning (2008)

Page 92 Warning with note that employee must tell Unit Manager before he leaves the Unit or he will be suspended (2007)

Page 93 First Written Warning (2008)

Page 110 Warning (2006)

And the additional disciplinary actions by LPNs as to Aides in the other Exhibits include:

Exhibit E-11 Warning (2007)

Exhibit E-17 Suspension for 2 days (2009)

Exhibit E-18 Suspension for 1 day (2004)

IV. ARGUMENT

A. **The Regional Director Incorrectly Determined the Existence of Supervisory Authority Based on the Frequency of its use.** The Regional Director reached his decision to reject the evidence of the LPN's statutory supervisor authority and status because he "is reluctant to extinguish Section 7 rights here on such a slender record of disciplines over a six year stretch," citing Family Healthcare, Inc., 354 NLRB No. 29 (2009) at pages 6-7, a decision of two (2) sitting members of the Board. Such decisions were later declared invalid by the Supreme Court of the United States in New Process Steel, L.P. v. NLRB, 560 U.S. ___, 130 S.Ct. 2635 (2010).

In Family Healthcare, Inc., the Board affirmed the ALJ's decision without making further findings or rulings. The ALJ's decision at pages 6-7 discusses "assignment and

effectively recommending assignment,” not discipline; and, relied on Greenspan, D.D.S., P.C., 318 NLRB 70 (1995), enfd. mem. 101 F.2d 107 (2d Cir. 1996), to reject supervisory status “exercised too infrequently.” The ALJ, however, at page 7, took note that, while the Board did not overrule Greenspan in Oakwood Healthcare, Inc., 348 NLRB 686 (2006), the Board noted that it “has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed, where its exercise is sporadic and infrequent.”

In this case, the Record is clear that all of the LPN’s were notified of their authority in their Job Descriptions to initiate appropriate action and recommend disciplinary action to the Director of Nursing. These job descriptions must be considered in the determination of LPN supervisory status. *See: Grancare, Inc. v. NLRB*, 137 F.3d 372, 375 (6th Cir. 1998). In addition, all employees were notified through the Employee Manual of New Vista’s progressive discipline system (Exhibit E-7 at pages 42-44, 51-52; Tr. 148), under which work-related violations permit any employee’s supervisor, including the LPN’s, to begin disciplinary action. Therefore, the Regional Director’s paraphrase of the Board’s policies is incorrect and the reference inapposite. It is also inconsistent with the Board’s application of those policies in Oak Park Nursing Care Center, in which the Board determined that the authority to initiate disciplinary action as part of a progressive discipline system, as here, was sufficient evidence of statutory supervisor status. The Regional Director’s analysis fails to implement the Board’s precedent and policies for facilities with progressive discipline systems.

The Employer argued below that the Section 2(11) of the Act requires the existence of actual authority, not frequency of its exercise. This is consistent with the

Board's actual analysis in Oakwood Healthcare, Inc. and in Oak Park Nursing Care Center. *See also: NLRB v. Hilliard Dev. Corp.*, 187 F.3d 133, 144 (1st Cir. 1999) ("the question under § 2(11) is whether authority exists, not how frequently it is exercised"). The Regional Director's Decision, at page 17, agrees ("the Act demands only the possession of Section 2(11) authority, not its exercise...."). The Regional Director conceded below, at page 24 of his Decision, that "The Record shows LPN involvement in actual progressive discipline of CNAs 33 times over a 6-1/2 year period." These disciplinary actions involved were all initiated by LPN's either filing New Vista's disciplinary forms (writing up the Aides) or by their taking their concerns to the Unit Manager for further action. The Regional Director, at page 26, conceded that the submission of these disciplinary forms resulted in discipline.

The Regional Director expressly found, at page 25, that:

- (1) LPN Simon Ramirez "initiated a notice of corrective action against at CNA in late December 2007 for repeatedly taking excessive breaks and for failing to properly care for a resident."
- (2) LPN Marisol Roldan "initiated an employee warning notice against CNA Stella Ighasa in October 2008 for failing to properly position a resident and for failing to empty a Foley catheter bag."

That is all that is required under the Oak Park Nursing Care Center to confirm statutory supervisory status in progressive discipline system cases. The Regional Director's requirement of additional involvement in the process after initiating the disciplinary action by filing the required disciplinary form is error. The Record demonstrates that

LPN's have the authority and discretion to initiate the progressive disciplinary system process or to seek to resolve their concerns through other methods.

The Regional Director's conclusion, at page 26, that LPN's "are barely on the margins of the disciplinary process" ignores the fact, conceded in his decision, that each of the disciplinary actions involved as initiated by a decision of an LPN to trigger the progressing discipline system process by filing the required form or bringing a disciplinary complaint to a superior instead of resolving the issue on their own by counseling the Aide or doing nothing. This is patently more than "simply reporting factual findings" (page 26). The conclusion is therefore contrary to Board's precedent in Oak Park Nursing Care Center; Sheraton Hotels & Resorts Worldwide, 350 NLRB 1114 (2007); and Progressive Transportation Services, 340 NLRB 1044 (2003), in which the Board determined that, where the filing of progressive discipline forms is an integral part of the Employer's progressive discipline system and there is evidence that they are a prerequisite to discipline, Section 2(11) supervisor status was established. The Record in this case supports the same result.

B. The Regional Director Applied the Wrong Legal Standard to Determine Whether the LPN's Had Supervisory Authority Effectively to Recommend Discipline. The Regional Director's Decision, at page 26, erred as a matter of law when he rejected Section 2(11) status based on the LPN's authority effectively to recommend discipline on the basis of his conclusion that the incidents involved were not subject to independent investigation by superiors. This conclusion is contrary to the express holding otherwise in Extendicare Health Services, Inc. v. NLRB, 182 Fed.Appx. 412 (6th Cir. 2006) and Caremore, Inc. v. NLRB, 129 F.3d 365, 370 (6th Cir. 1997), as well as

with the Board's analysis in Sheraton Hotels & Resorts Worldwide, in which the Board found Section 2(11) supervisory status based on discipline for an employer using "corrective action forms" under similar facts; and, in Mountaineer Park, Inc., in which the Board found Section 2(11) supervisory status based on effectively to recommend discipline, noting that, even where such submittals were investigated by upper management, where the manager, as in this case, routinely signed off on the recommendation for discipline where they were justified. The issue in the Board's precedent is whether the determination by the LPN that discipline is required is "effective" (i.e., that it usually results in discipline). In Progressive Transportation Services, the Board found Section 2(11) supervisor status based on effectively to recommend discipline where the supervisor initiated the disciplinary process by bringing disciplinary issues to the attention of the department director, who decided the level of discipline based on the supervisor's account.

The Regional Director conceded, as noted above, that LPN's here initiate the disciplinary process. The Record is clear (Exhibit C-4) that such disciplinary actions become part of the employee's personnel file laying a foundation for future discipline, as required in Oak Park Nursing Care Center, 351 NLRB at 28-29, *citing* Promedica Health System, 343 NLRB 1351 (2004), *enf. in relevant part* 206 Fed.App. 405 (6th Cir. 2006), *cert. den.* 127 S.Ct. 2033 (2007). The Regional Director erred by not applying the Board precedents to find these facts sufficient to establish the LPN's Section 2(11) supervisory status in this case.

Given the LPN's express authority to take such actions and make such recommendations in their Job Descriptions and the Employee Manual, the Record

contains all the evidence required by the Act and by the Board's controlling precedents. The Regional Director reluctance to apply controlling precedent was error and should be reviewed and reversed by the Board.

V. CONCLUSION

Based on the foregoing, the Regional Director erred in finding that the remaining petitioned-for LPN's were not statutory supervisors as defined by Section 2(11) of the Act and in ordering an election instead of dismissing the petition. Accordingly, the Employer requests that his March 9, 2011 decision be reversed and the petition dismissed.

Respectfully submitted,

/s/ Louis J. Capozzi, Jr., Esquire
Louis J. Capozzi, Jr., Esquire
Dawn L. Richards, Esquire
Bruce G. Baron, Esquire
CAPOZZI & ASSOCIATES, P.C.
2933 North Front Street
Harrisburg, PA 17110-1250
Telephone: (717) 233-4101
FAX: (717) 233-4103
LouC@CapozziAssociates.com
DawnR@CapozziAssociates.com
BruceB@CapozziAssociates.com

Attorneys for New Vista Nursing &
Rehabilitation

DATE: March 23, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of March 2011, a true and correct copy of the foregoing EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION OF MARCH 9, 2011 was served on the following by the method designated:

Lester A. Heltzer, Executive Secretary (Via Electronic Filing)
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, DC 20570-0001

J. Michael Lightner, Regional Director (Via U.S. Mail)
NLRB Region 22
Veterans Affairs Building (5th floor)
20 Washington Place
Newark, NJ 07102

William S. Massey, Esquire (Via U.S. Mail)
GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway (8th floor)
New York City, NY 10003
[Attorneys for 1199]

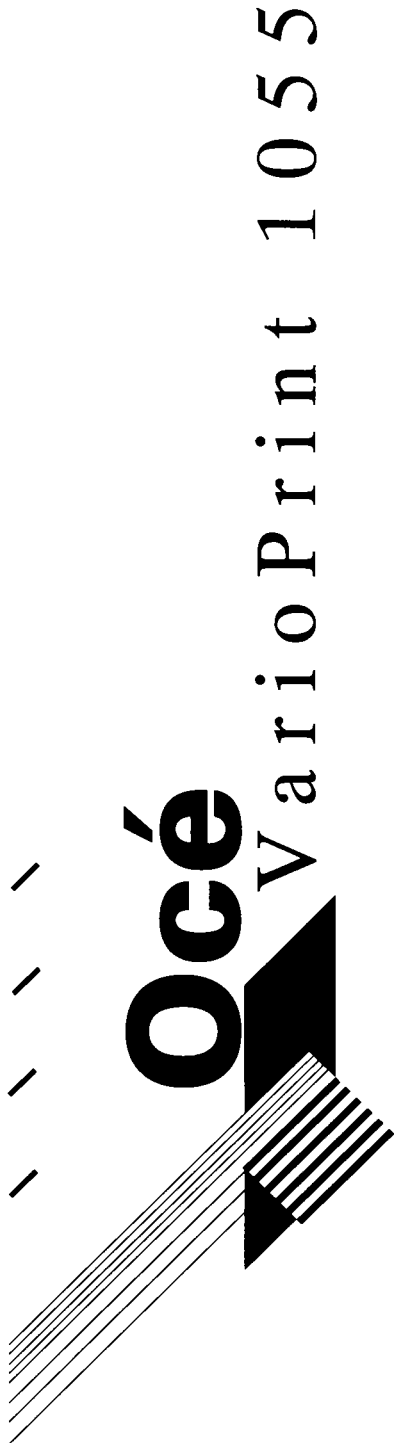
/s/ Bruce G. Baron, Esquire
Bruce G. Baron, Esquire

DATE: March 23, 2011

Date 05-31-2011

Time 12:04 34

System vp105505880



UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND
REHABILITATION, LLC
Employer

and

Case 22-RC-13204

1199 SEIU UNITED HEALTHCARE
WORKERS, NJ REGION
Petitioner

ORDER

Employer's Request for Review of the Regional Director's Decision and
Direction of Election is denied as it raises no substantial issues warranting review.¹

WILMA B. LIEBMAN, CHAIRMAN

CRAIG BECKER, MEMBER

Member Hayes, dissenting:

I would grant the Employer's Request for Review.

BRIAN E. HAYES, MEMBER

Dated, Washington, D.C., April 8, 2011.

Exhibit G

¹ The Employer has filed a motion requesting that Members Becker and Pearce recuse themselves from participating in this proceeding. Member Pearce is recused and has taken no part in considering this case. Consistent with the principles set forth in Pomona Valley Hospital Medical Center, 355 NLRB No. 40 (2010), the Employer's request for Member Becker to recuse himself is denied.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NEW VISTA NURSING AND
REHABILITATION, LLC

EMPLOYER

AND

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NJ REGION

PETITIONER

Date Filed

Case No. 22-RC-13204

1/25/11

Date Issued APRIL 8, 2011

Type of Election
(Check one:)

- ☐ Stipulation
☒ Board Direction
☐ Consent Agreement
☐ RD Direction
Incumbent Union (Code)

(If applicable check
either or both:)

- ☐ 8(b) (7)
☐ Mail Ballot

GREEN BALLOTS

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 380
2. Number of Void ballots 1199 SEIU UNITED HEALTHCARE
3. Number of Votes cast for WORKERS EAST, NJ REGION - - - - - 26
4. Number of Votes cast for ~~WORKERS EAST, NJ REGION~~ - - - - -
5. Number of Votes cast for ~~WORKERS EAST, NJ REGION~~ - - - - -
6. Number of Votes cast against participating labor organization(s) 7
7. Number of Valid votes counted (sum of 3, 4, 5, and 6) 33
8. Number of Challenged ballots 4
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 37
10. Challenges are (not) sufficient in number to affect the results of the election.
11. A majority of the valid votes counted plus challenged ballots (Item 9) has been cast for 1199 SEIU UNITED HEALTHCARE WORKERS EAST, NJ REGION

For the Regional Director
REGION 22

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For _____
(EMPLOYER)

For K. E. L. A. T. I.
(PETITIONER)

For _____

For _____

Exhibit H

1199SEIU

United Healthcare Workers East

PRESIDENT
George Gresham

SECRETARY TREASURER
Maria Castaneda

EXECUTIVE VICE-PRESIDENTS
Norma Amsterdam
Yvonne Armstrong
Angela Doyle
Aida Garcia
George Kennedy
Steve Kramer
Patrick Lindsay
Joyce Neil
John Reid
Bruce Richard
Mike Rifkin
Monica Russo *
Neva Shillingford
Milly Silva
Veronica Turner
Estela Vazquez

VICE-PRESIDENTS AT LARGE
Mark Bergen
Gerard Cadet
Rickey Elliott
Dale Ewart *
Tim Foley
Pearl Granat
Vanessa Johnson
Pat Lippold
Bruce Popper
Barbara Rosenthal
Minerva Solla
Celia Wcislo

VICE-PRESIDENTS
Jacqueline Alleyne
Ronnie Babb
Carolyn Brooks
Lisa Brown
Sally Cabral
Donald Crosswell
Armeta Dixon
Enid Eckstein
Jerry Fishbein
Roy Garcia
Frances Gentle
Rebecca Gutman
Ruth Heher
Kwai Kin (David) Ho
Todd Hobler
Antonio Howell
Anne Jacobs-Moultrie
Keith Joseph
Maria Kercado
Tyrek Lee
Rosa Lomuscio
Winslow Luna
Coraminita Mahr
Dalton Mayfield
Rhina Molina
Robert Moore *
Gerard Nordenberg
Isaac Nortey
Elsie Otero
Vasper Phillips
Rhadames Rivera
Victor Rivera
Rene R. Ruiz
James Scordato
Claudice St. Hilaire
John Seales
Rona Shapiro
Allan Sherman
Patricia Smith
Greg Speller
Katherine Taylor
Clare Thompson
Kathy Tucker
Antoinette Turner
Nelson Valdez
Laurie Vallone
Mary Whitten
Fernando Wilson
Daine Williams
Cynthia Wolff
Gladys Wrenick

GENERAL COUNSEL
Daniel J. Ratner

**CHIEF FINANCIAL OFFICER &
DIRECTOR OF ADMINISTRATION**
Michael Cooperman

* Acting

May 3, 2011

BY FAX, EMAIL, AND REGULAR MAIL

New Vista Nursing and Rehabilitation, LLC
Newt Weinberger, Administrator
300 Broadway
Newark, NJ 07104

Dear Mr. Weinberger:

As you are aware, the National Labor Relations Board has certified 1199SEIU United Healthcare Workers East ("the Union") as the exclusive representative of the employees in the bargaining unit of LPNs employed by New Vista Nursing and Rehabilitation, LLC ("the Employer"). Accordingly, we request that the Employer commence negotiations for an initial collective bargaining agreement. The Union is available to meet with the Employer's bargaining representative(s) on May 10 and/or 11, 2011. Please contact me to let me know which of these dates are acceptable. If neither of these dates is acceptable, please provide me, by May 9, with the Employer's available dates for the remainder of this month.

Further, in order to prepare for, and engage in, collective bargaining, we request that the Employer provide the Union with the information set forth below. Please provide us with the information requested as soon as possible, but no later than May 16, 2011.

1. Any and all documents, including but not limited to job descriptions and performance evaluations that describe the job duties for LPNs.
2. For each employee working in a bargaining unit position, including current probationary employees, such documents as will show the following:
 - a) job title for each employee;
 - b) date of hire;
 - c) current hourly rate of pay
 - d) regular hours of work;
 - e) number of overtime hours worked (on a quarterly basis if possible) in 2009 and 2010;
 - f) home address
 - g) whether employee is classified as per diem

Exhibit I

**NEW YORK CITY
PRINCIPAL
HEADQUARTERS**

310 West 43rd St.
New York, NY 10036
(212) 582-1890

ALBANY
155 Washington Ave.
Albany, NY 12210
(518) 396-2300

HICKSVILLE
100 Duffy Ave., Suite 3 West
Hicksville, NY 11801
(516) 547-1115

**6111
Balt**
(410) 332-1199

KINGSTON
75 Crown Street
Kingston, NY 12401
(845) 336-1000

(617) 284-1199

NEW JERSEY
555 Route 1 South, 3rd Fl.
Iselin, NJ 08830
(732) 387-0113

**1 Ave
14216**
(716) 982-0540

ROCHESTER
225 W. Broad St., Ste. 8
Rochester, NY 14608
(585) 744-0030

FLORIDA
14645 NW 77th Avenue, Ste. #201
Miami Lakes, FL 33014
(305) 623-3000

SYRACUSE
404 Oak St., Suite 120
Syracuse, NY 13203
(315) 474-1743

GOUVERNEUR
95 E Main St., 2nd Fl.
Gouverneur, NY 13642
(315) 287-9013

WHITE PLAINS
99 Church St.
White Plains, NY 10601
(914) 903-5700

Pg 2. New Vista LPNs – first contract negotiations.

3. Documents showing the total cost to the Employer for each of the following benefits provided to bargaining unit employees for the periods from January 1 through December 31, 2009, and January 1 through December 31, 2010: health, dental, vision, life insurance, and pension/retirement plan.
4. Documents showing the name of each unit employee covered by each of the following categories of health insurance: single, family, employee/spouse, employee/child.
5. Documents showing the health insurance premiums paid by each unit employee, and SPD of the health insurance plan.
6. Documents showing all current unit employees who have opted out of health insurance coverage.
7. Documents showing unit members' current paid time off benefits such as, holidays, vacation, sick days, personal days, and the accrual formula for such paid time off.
8. SPD for the unit employees' life insurance policy.
9. SPD for the unit employees' retirement benefits.
10. Documents showing the date and amount of the last wage increase for each bargaining unit member.
11. Documents showing the overtime policy currently applicable to unit employees.

To the extent possible, we would appreciate if you would provide this information in electronic format. Please do not hesitate to contact me if you have any questions. I can be reached at roy.garcia@1199.org or 732-287-8113.

Thank you for your cooperation.

Sincerely,



**Roy Garcia, Vice President
1199SEIU UHE**

CC: Morris Tuchman, Esq.

From: Roy Garcia [mailto:roy.garcia@1199.org]
Sent: Friday, May 13, 2011 2:53 PM
To: William Massey
Subject: Fw: Follow up on our conversation

Roy Garcia, Vice President
NJ Region - 1199SEIU UHE

From: morris@tuchman.us [mailto:morris@tuchman.us]
Sent: Friday, May 13, 2011 02:31 PM
To: Newt Weinberger <weinberger22@yahoo.com>; Roy Garcia
Subject: Re: Follow up on our conversation

Dear All; We are testing the certification and will not be bargaining.
Morris

Sent on the Sprint® Now Network from my BlackBerry®

From: "N. Weinberger" <weinberger22@yahoo.com>
Date: Fri, 13 May 2011 18:02:11 +0000
To: Tuchman Morris<morris@tuchman.us>
ReplyTo: weinberger22@yahoo.com
Subject: Fw: Follow up on our conversation

Sent via BlackBerry by AT&T

From: Roy Garcia <roy.garcia@1199.org>
Date: Fri, 13 May 2011 18:01:02 +0000
To: weinberger22@yahoo.com<weinberger22@yahoo.com>
Subject: Follow up on our conversation

Hello Newt. I just wanted to follow up on our conversation that we had earlier this week regarding bargaining.

You were going to speak to Morris about your next steps regarding my May 3rd letter requesting for information and dates to negotiate.

Will you be sending me dates to negotiate and the information we requested or are you planning to fight recognition?

Please let me know either way.

5/31/2011

Exhibit J

County of Essex
State of New Jersey

Case 22-CA-29988

CONFIDENTIAL WITNESS AFFIDAVIT

I, Roy Garcia, being duly sworn upon my oath, hereby state as follows:

I have been given assurances by an agent of the National Labor Relations Board that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the Board and will not be disclosed unless it becomes necessary to produce the Confidential Witness Affidavit in connection with a formal proceeding.

My telephone number is 732-287-8113.

- 1 1. I am employed by the Union 1199 SEIU United Health Care Workers East, NJ
2 Region located at 555 Route 1 South, 3rd Floor, Iselin, NJ 08830. I hold the position
3 of Vice President. I have held that position for approximately 4 years. Part of my
4 duties includes negotiating collective bargaining agreements with employers who
5 employ employees represented by the Union.
- 6 2. On or about April 18, 2011, the National Labor Relations Board, herein the Board,
7 certified the Union as the exclusive collective bargaining representative of a unit of
8 "all full-time and regular part-time Licensed Practice Nurses employed by the
9 Employer at its Newark, New Jersey facility, excluding all other employees, guards,
10 and supervisors as defined by the Act.
- 11 3. By letter dated May 3, 2011, I requested that the Employer commence negotiations
12 for an initial collective-bargaining agreement. I offered two dates to meet with the
13 Employer to negotiate. In this same letter, I requested that the Employer provide the
14 Union with information necessary to prepare for, and engage in collective bargaining.
15 I asked that the information be provided as soon as possible but no later than May 16,
16 2011.

Exhibit K

X RG

1 4. To date, the Employer has not agreed to recognize and bargain with the Union,
2 bargain for an initial collective-bargaining agreement or provide the information
3 requested in my May 3, 2011 letter. Rather on or about May 10, 2011 I had a
4 telephone conversation with the Employer's ~~President~~ ^{Administrator} Newt Weinberger about
5 bargaining. I asked him what he was going to do about the May 3, 2011 letter I sent.
6 He told me at that time he was going to speak with his attorney Morris Tuchman
7 about the Employer's next steps regarding my May 3, 2011 letter requesting
8 information and dates to negotiate.

9 5. Not having heard from Weinberger, I sent an e-mail on Friday May 13, 2011 to
10 Weinberger following up on our earlier conversation and again asked if he would be
11 giving me dates to negotiate and the information I had requested.

1 6. By e-mail dated May 13, 2011, the Employer's attorney Tuchman informed me that
2 his client is testing the certification and will not be bargaining.

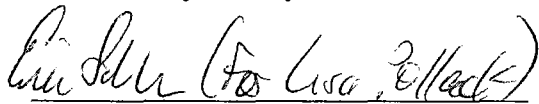
3 **I am being provided a copy of this Confidential Witness Affidavit for my review. If,**
4 **after reviewing this affidavit again, I remember anything else that is relevant, or**
5 **desire to make any changes, I will immediately notify the Board agent. I understand**
6 **that this affidavit is a confidential law enforcement record and should not be shown**
7 **to any person other than my attorney or other person representing me in this**
8 **proceeding.**

I have read this statement consisting of (3) pages, including this page, I fully understand its contents, and I certify that it is true and correct to the best of my knowledge and belief.



Subscribed and sworn to before me at Newark, NJ

This 17th day of May 2011



Lisa D. Pollack, Board Agent
National Labor Relations Board

Campbell, Gwendolyn

From: Pollack, Lisa D.
Sent: Tuesday, May 17, 2011 12:21 PM
To: Lightner, J. Michael; Fox, Richard; Schechter, Eric R.; Foley, Dorothy
Cc: Campbell, Gwendolyn
Subject: FW: New Vista

I just got this

-----Original Message-----

From: Morris Tuchman [mailto:morris@tuchman.us]
Sent: Tuesday, May 17, 2011 11:55 AM
To: Pollack, Lisa D.
Subject: Re: New Vista

Dear Lisa; I look forward to the case law.
Yes, the employer is testing cert.
Morris

On 5/17/2011 11:45 AM, Pollack, Lisa D. wrote:

> Thank you for responding. We can't settle the case piecemeal. I will give you a case regarding the latter.

> The Union has filed a new charge in Case 22-CA-29988 alleging that the Employer is refusing to meet or schedule meetings with the Union and failing to provide requested information. The union claims that your client is testing cert. If this is so, please advise. I then can issue the complaint and move this matter forward.

>

> -----Original Message-----

> From: Morris Tuchman [mailto:morris@tuchman.us]
> Sent: Tuesday, May 17, 2011 11:40 AM
> To: Pollack, Lisa D.
> Subject: New Vista

>

> Dear Lisa; I have reviewed things with my client and to this point,
> they will settle the other issues in an informal settlement with a non
> admissions clause. They will not settle the LPN "supervisor" duties
> part of the case. Perhaps if you provide authority supporting your
> position on that issue, I could re-engage with them.

> Essentially, they are saying that 1) the LPNs have always been
> supervisors and 2) if they weren't, the facility should be legally
> entitled to assure that the Board recognize them as such in the future.
> They should not forever be compelled to operate the facility without
> the supervision that they deem necessary.
> Morris

Exhibit L